IN THE

Supreme Court of the United States

STAR NORTHWEST, INC., a Washington corporation d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge,

Petitioner,

v.

CITY OF KENMORE, a Washington municipal corporation, and KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Star Northwest, Inc. d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge ("Kenmore Lanes") operates a bowling alley, restaurant and card room in Kenmore, King County, Washington that has done business in Kenmore for more than 30 years. Its card room, the sole card room in Kenmore, has been continually licensed by the State of Washington since 1974. In December 2005, the Kenmore City Council adopted an ordinance banning the operation of social card rooms in the City of Kenmore. The ordinance did not grant Kenmore Lanes any amortization period in which it might recoup its capital investments by permitting its operation as a nonconforming use. Instead, it provided that the ordinance would become effective in 10 days. The record below indicates that without the revenues from the card room, the entire business is not profitable and would be forced to close. The district court and Ninth Circuit have rejected Kenmore Lanes' Fourteenth Amendment based substantive due process challenge to the ordinance. The question presented is

Whether the United States Court of Appeals for the Ninth Circuit erred in concluding that the Kenmore, Washington ordinance satisfied Fourteenth Amendment substantive due process requirements, in direct conflict with the Washington Supreme Court's opinion that the Fourteenth Amendment requires that when local governments "terminate nonconforming uses . . . they are constitutionally required to provide a reasonable amortization period." *Rhod-A-Zalea v. Snohomish County*, 136 Wash. 2d 1, 10, 959 P.2d 1024, 1029 (1998) (citation omitted).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Star Northwest, Inc., d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge, a Washington corporation, has no parent, and no publicly held company owns 10% or more of the corporation's stock.

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Petitioner Star Northwest, Inc. d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge ("Kenmore Lanes") respectfully submits this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit issued a Memorandum decision on May 28, 2008. Appendix (hereinafter "App."), *infra*, 3a-12a. On Appellant's Petition for Panel Rehearing, on January 7, 2009, the panel issued an order amending its May 28, 2008 Memorandum. App., *infra*, 1a-2a. Neither the Memorandum nor the Order is published. The judgment of the district court (App., *infra*, 13a-23a) is not published. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Kenmore Lanes is a community-oriented business featuring a bowling alley, restaurant, bar, and card room in Kenmore, King County, Washington (the "City"). It is the City's largest private employer with approximately 220 full-time and part-time employees. Kenmore Lanes' bowling alley has been in continuous operation at the same location since 1958. Its 11th Frame card room has been operating continuously under license from the Washington State Gambling Commission at that location since approximately 1974. No other card rooms operate in the City.

Prior to acting to ban social card rooms, the City was apparently not concerned with any impact of gambling at Kenmore Lanes. It did not undertake any investigation of the impact of card room operations in the community. Nor were council members aware of any evidence that card rooms had been the source of unusual criminal activity in Kenmore or that they caused injury to surrounding communities.

To the contrary, there is widespread community acceptance of gambling in Kenmore, King County and the state of Washington. State-authorized gambling activities are ubiquitous in Kenmore, a city of more than 18,000, and other King County communities. Washington Lottery tickets and pull tabs are sold throughout the City and across King County. Charitable poker games in which participants take half the pot are sponsored by local grocery stores. Card rooms operate at 48 locations in King County.

In 2005, the City Council held hearings on the question of whether it would adopt a ban on social card room operations in the City of Kenmore. The City Council knew that banning card rooms would cause financial injury to the owner of Kenmore Lanes, but did not investigate whether closing the card room would force closure of the bowling alley and the restaurant. It did not investigate how many employees worked at Kenmore Lanes and how many would lose their jobs if card rooms were banned.

The City Council did know that it had the option of banning all card rooms, but delaying the effective date. Based on an email from the City Manager and a statement by the City Attorney at a public meeting, the City Council knew that the City Attorney had opined that "the council could adopt a ban on card rooms effective at a future date." That strategy would, in effect, give Kenmore Lanes an amortization period in which to recoup the value of the business that would be lost. The City Council did not do that.

At a December 19, 2005, Kenmore City Council meeting, the City circulated a draft ordinance to ban gambling. As circulated, the draft ordinance would have allowed Kenmore Lanes to remain in business through 2006. The last sentence of Section 1 of the ordinance stated this result as follows:

> Nothing in this ordinance shall be construed to prohibit the continued operation of any licensed social card game during the remainder of the current term of any license issued by the State Gambling Commission for any such social card game.

The then-current term of Kenmore Lanes' card room license ran through December 31, 2006. Thus, as recommended to the Kenmore City Council, the draft ordinance gave Kenmore Lanes (and the employees) a year's notice of the intended closing.

After closing the public hearing on the draft ordinance to ban gambling at the December 19, 2005 meeting, one of the council members moved to delete the last sentence of Section 1, intentionally denying Kenmore Lanes its right to operate for the duration of its current license. The motion passed and modified Section 1 of the ordinance as follows:

> Pursuant to RCW 9.46.295, "social card games," as that term is defined in RCW 9.46.0282 as now in effect or may subsequently be amended, are prohibited within the City of Kenmore. Social card games shall not be permitted, maintained or operated as a commercial stimulant for the operation of any business primarily engaged in the selling of food or drink for consumption on the premises, nor for any other reason or under any other circumstances. Nothing in this ordinance shall be construed to otherwise change the scope of any current license issued by the State Gambling Commission. ~~Nothing in this ordinance shall be construed to prohibit the continued operation of any licensed social card game during the remainder of the current term of any license issued by the State Gambling Commission for any such social card game.~~

The City Attorney stated that the ordinance, as amended, could be interpreted to mean that the City Council's action violated state law which prohibits cities from changing the scope of an issued license, and suggested further analysis. With little discussion, the City Council adopted Ordinance No. 05-0237, as amended (the "Ordinance"). App., *infra*, 24a-31a.

The record is devoid of any explanation of the reasons the City Council took to ban all card rooms because the Ordinance states no purpose and the City objected to deposition testimony from council members about their decision-making process. The Ordinance provides no relief and no amortization period for Kenmore Lanes' existing, licensed card room. The Ordinance was scheduled to become effective on December 29, 2005, 10 days after the December 19th meeting. App., *infra*, 30a, 31a.

The profits from the card room subsidize Kenmore Lanes' bowling alley, the restaurant, the employee benefits, and all of Kenmore Lanes' community and charitable activities. If the card room must close, then the entire business will close. Relocation of Kenmore Lanes' card room, restaurant, and bowling alley to a different location would cost more than the business is worth. There are no viable locations in King County for a new card room. Even if a location could be found, the costs of moving the business and the delay in rebuilding goodwill make relocation impracticable. This means that if the Ordinance is enforced, Kenmore Lanes will close, and Kenmore Lanes will lose the entire value of its investment, calculated at $4,936,000, as of December 31, 2005.

Before the Ordinance became effective, Kenmore Lanes filed suit against the City of Kenmore and Kenmore City Council (collectively the "City") in the United States District Court for the Western District of Washington seeking injunctive relief and damages, and alleging, in part, that the Ordinance violated its Fourteenth Amendment right to substantive due process and entitled Kenmore Lanes to relief under 42 U.S.C. § 1983. On December 28, 2005, the district court granted Kenmore Lanes' motion for temporary restraining order. In March 2006, the temporary restraining order was continued as a preliminary injunction pending trial pursuant to stipulation of the parties.

On August 10, 2006, the district court granted summary judgment dismissing Kenmore Lanes' federal claims. App., *infra*, 13a-23a. It reasoned that Kenmore Lanes did not have a property right supporting a Fourteenth Amendment claim because state licensed gambling is "vice"-like and has no constitutional protection, and Kenmore Lanes had no "vested right" to operate a card room based on a Washington Administrative Code provision, WAC 230-04-175. App., *infra*, 17a.

Kenmore Lanes timely appealed and asked the United States Court of Appeals for the Ninth Circuit to issue a stay preventing enforcement of the Ordinance during the appeal. On September 28, 2006, the Ninth Circuit granted the motion for stay. Based on that stay, Kenmore Lanes and its card room remains open to this day.

In a May 28, 2008 Memorandum (App., *infra*, 3a-12a), the Ninth Circuit affirmed the district court's ruling, but with somewhat different reasoning. The Ninth Circuit accepted for the purpose of analysis that Kenmore Lanes' card room "qualifies as a nonconforming use within the meaning of [Kenmore] Municipal Code § 18.20.1860." App., *infra*, 5a. It also recognized that "Washington courts have recognized a federal constitutional right, under the Fourteenth Amendment substantive due process guarantee, to a reasonable amortization period for nonconforming uses terminated by state or local regulation. *See State v. Thomasson*, 378 P.2d 441, 443 (Wash. 1963); *Rhod-A-Zalea v. Snohomish County*, 959 P.2d at 1029." App., *infra*, 6a. The Ninth Circuit rejected Kenmore Lanes' federal substantive due process claim, however, reasoning that "[t]hose nonconforming uses that are not vested rights under Washington law, however, are not entitled to the benefit of an amortization period" and "[u]nder Washington law, a gambling license cannot create a vested right." App., *infra*, 6a-7a. The Ninth Circuit said nothing about the district court's "vice"-like exception to constitutional rights.

The Ninth Circuit's conclusion that under Washington law a gambling license cannot create a vested right was anchored in WAC 230-04-175, which provided that "the issuance of any license by [the state gambling] commission shall not be construed as granting a vested right in any of the privileges so conferred." This was error because WAC 230-04-175 had been repealed in January 2008, prior to the Ninth Circuit decision, and could not undermine Kenmore Lanes' claim to a property right. Kenmore Lanes explained this to

the Ninth Circuit in a timely motion for panel rehearing, filed June 9, 2008.

In an order issued on January 7, 2009 (App., *infra*, 1a-2a), the Ninth Circuit panel amended its prior Memorandum, deleting its entire analysis of Kenmore Lanes' federal substantive due process claim and reliance on the repealed WAC provision in Section 2 of its Memorandum and substituted a new Section 2. App., *infra*, 2a. In its revised analysis, the Ninth Circuit ignored the Fourteenth Amendment substantive due process right to an amortization period for nonconforming uses terminated by state or local regulation recognized by the Washington Supreme Court that it had noted in the May 28, 2008, Memorandum and stated merely that Kenmore Lanes had failed to meet the "exceedingly high burden of proving that a challenged land use regulation fails to advance a legitimate government purpose." App., *infra*, 2a. The Ninth Circuit did not attempt to reconcile its conclusion with the Washington Supreme Court opinions that it had cited in its earlier Memorandum.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has differed, without explanation, from clear contrary decisions from the Washington Supreme Court, applying federal substantive due process principles to property rights recognized under Washington state law and requiring that legal nonconforming uses may not be terminated without allowing an adequate amortization period. The Washington Supreme Court decisions are not outliers on this question. Many state appellate courts have

reached the same conclusion under either substantive due process or takings principles. The split between the Ninth Circuit and the state courts presents the important question whether governments are free to ban legal nonconforming uses without any amortization period to allow the business owner to recoup its investment or mitigate its loss. Thus, this Court's Rule 10(a) is satisfied, and a Writ of Certiorari should issue.

I. The Washington Supreme Court Has Held that a Business Owner Has a Federal Substantive Due Process Right to an Amortization Period on Termination of a Legal Nonconforming Use, and Its Conclusion Is Consistent with Decisions of Many Other States.

The Ninth Circuit's May 28, 2008 Memorandum, accurately summarized applicable Washington law:

> It is well established under Washington law that the City may regulate a non-conforming use with "subsequently enacted reasonable police power regulations." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 959 P.2d 1024,1029 (Wash. 1998). The City is not required to allow a nonconforming use to exist indefinitely because "local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses." * * *
>
> 2. Washington courts have recognized a federal constitutional right, under the Fourteenth Amendment's substantive

> due process guarantee, to a reasonable amortization period for nonconforming uses terminated by state or local regulation. *See State v. Thomasson*, 378 P.2d 441, 443 (Wash. 1963); *Rhod-A-Zalea*, 959 P.2d at 1029.

App., *infra*, 6a. This substantive due process analysis is anchored in the Washington Supreme Court's state law-based judgment that termination of a legal existing use impairs a property interest.

When zoning laws were first enacted in the United States in the early Twentieth Century, states wrestled with how existing uses should be treated that did not comply with uses allowed in the new zoning designations.[1] There was a widespread belief that such nonconforming uses could not be terminated unless after a period of abandonment.[2] Over time, states continued to struggle with the issue because a nonconforming use's "grandfathered" status often created a local monopoly power which discouraged the business from ceasing operations.[3] While some states still forbade the forced termination of a legal business,[4] eventually many states

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1. 4A Norman Williams Jr., *American Land Planning Law*, at 225 (rev. vol. 1986) (the issue of nonconforming uses has been "one of the most important questions in American planning law").

2. *See* 1 Kenneth H. Young, *Anderson's American Law of Zoning*, § 6.04 at 489 (4th ed. 1995).

3. 8A McQuillin, *Municipal Corporations*, § 25.90 at 73 (3d ed. 2003).

4. *See, e.g., Commonwealth v. Hashem*, 526 Pa. 199, 589 A.2d 1378 (1991) (amortization of a pre-existing use is per se

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came to a compromise position: nonconforming uses could not be immediately abolished but could be terminated after a phasing out, or "amortization" period.[5] Washington, like many states, grounds this right to a pre-cessation amortization period in the Fourteenth Amendment.[6]

There is no federal law of zoning so federal courts must look to state law. *League to Save Lake Tahoe v. Crystal Enters.*, 685 F.2d 1142, 1144 (9th Cir. 1982); *see also Ebel v. City of Corona*, 767 F.2d 635, 639 (9th Cir. 1985) (applying balancing test from *Northend Cinema, Inc., v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1159-60 (1978)). They also look to state law to "define and determine the range of interests that qualify for

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confiscatory); *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. 1965) (six-year amortization period was unconstitutional as a taking of private property for public use without just compensation); *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697 (1953) (an ordinance allowing a city to remove a legal nonconforming use even after a "reasonable" time was unconstitutional).

5. 4A Norman Williams Jr., *American Land Planning Law*, at 225 (rev. vol. 1986); *see also League to Save Lake Tahoe v. Crystal Enters.*, 685 F.2d 1142, 1146 (9th Cir. 1982).

6. *See, e.g., State v. Thomasson*, 61 Wash. 2d 425, 428, 378 P.2d 441, 443 (1963) (due process grounds); *State ex. rel. Miller v. Cain*, 40 Wash. 2d 216, 218, 242 P.2d 505, 506 (1952); *Compare, Austin v. Older*, 283 Mich. 667, 278 N.W. 727, 730 (1938). *And see Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 308, 129 A.2d 363 (1957) ("[I]t is unreasonable and unconstitutional for a zoning law to require immediate cessation of nonconforming uses otherwise lawful") (surveying cases).

protection as property" under the Fifth and Fourteenth Amendments. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). The Washington Supreme Court has consistently held that property owners have rights to continue to operate a legitimate business despite a change in zoning. *State v. Thomasson*, 61 Wash. 2d 425, 428, 378 P.2d 441, 443 (1963); *State ex rel. Ogden v. Bellevue*, 45 Wash. 2d 492, 495, 275 P.2d 899, 901-02 (1954); *State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 218, 242 P.2d 505, 506 (1952). This is consistent with the Washington courts' recognition that a business like Kenmore Lanes' card room is a valuable property interest:

> Property is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights and other intangibles as well as physical things. And property is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition. *The right to operate a lawful business is a property right.*

Lee & Eastes v. Pub. Serv. Comm'n, 52 Wash. 2d 701, 704, 328 P.2d 700, 702 (1958) (internal citations omitted) (emphasis added).

Applying this property right, Washington allows a nonconforming use to be terminated, but it cannot be constitutionally done without providing for a reasonable amortization period. *Rhod-A-Zalea*, 959 P.2d at 1029 ("Local governments, of course, can terminate

nonconforming uses but they are constitutionally required to provide a reasonable amortization period"). Moreover, this right is not balanced against the goals of government regulation. It will be allowed to continue even though the use is considered to be "detrimental to important public interests." *Id.* at 1027. The harm from depriving a property owner of his business outweighs the public interest in immediately abolishing the nonconforming use. *Id.* (noting that although a nonconforming use may be detrimental to the public health, safety, morals, or welfare, it cannot be immediately ceased without infringing on the property owner's constitutionally-protected rights); *see also City of University Place v. McGuire*, 144 Wash. 2d 640, 648–49, 30 P.3d 453, 457 (2001); *City of Seattle v. Martin*, 54 Wash. 2d 541, 544, 342 P.2d 602, 603-04 (1959); *Miller*, 242 P.2d at 508 (a nonconforming gasoline service station use was allowed to continue *indefinitely* where the harm to the property owner in losing the business outweighed the public's interest in terminating the use).

Neither the City of Kenmore, nor the district court nor the Ninth Circuit has attempted to argue that the Washington Supreme Court incorrectly applied federal constitutional law to termination of a legal nonconforming use. To the contrary, decisions of other states are consistent with Washington's explication of federal constitutional law.

The Washington cases, themselves, cited extensively this Court and to decisions of other states. In concluding that nonconforming uses were subject to later-enacted regulations enacted for the health, safety and welfare of the community, the Washington Supreme Court in

Rhod-A-Zalea cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller & Son Paving, Inc. v. Wrightstown Township*, 42 Pa. Commw. 458, 401 A.2d 392 (1979); *Watanabe v. City of Phoenix*, 140 Ariz. 575, 683 P.2d 1177 (Ariz. Ct. App. 1984); and *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J. Super. 103, 361 A.2d 12 (1976). 959 P.2d at 1029. And, its conclusion that an ordinance immediately terminating a nonconforming use is invalid cited to *Township of Orion v. Weber*, 83 Mich. App. 712, 269 N.W.2d 275 (1978), and *Incorporated Village of Brookville v. Paulgene Realty Corp.*, 24 Misc. 2d 790, 200 N.Y.S.2d 126 (1960). *Id.*

In *Township of Orion*, the court surveyed decisions of the Michigan Supreme Court, *e.g. Wolverine Sign Works v. City of Bloomfield Hills*, 279 Mich. 205, 271 N.W. 823 (1937), holding that immediate termination of existing legal uses is arbitrary and illegal, and invalidated new restrictions on an existing sand and gravel operation as confiscatory. 269 N.W.2d at 280.

In *Paulgene Realty*, the court surveyed prior decisions of the New York courts holding that a legal nonconforming use may not be subsequently terminated, *e.g. People v. Miller*, 304 N.Y. 105, 107, 106 N.E.2d 34 (1952), and refused to apply subsequently adopted police power-based regulations to a legal existing use. 24 Misc. 2d at 795, 795.

Other states have reached the same conclusion. In *Grant v. Mayor and City Council of Baltimore*, the Maryland Court of Appeals surveyed cases analyzing

the constitutional implications of termination of a legal nonconforming use and concluded:

> It soon was and still generally is held that it is unreasonable and unconstitutional for a zoning law to require immediate cessation of nonconforming uses otherwise lawful. *Anne Arundel County v. Snyder*, 186 Md. 342, 346; *Amereihn v. Kotras*, 194 Md. 591, 601 and cases cited; *Jones v. City of Los Angeles (Cal.)*, 295 P. 14; *Standard Oil Co. v. City of Bowling Green (KY.)*, 50 S.W. 2d 960; *Des Jardin v. Town of Greenfield (Wis.)*, 53 N.W. 2d 784.

212 Md. at 308.[7] *See also Matter of Toys "R" Us. v. Silva*, 89 N.Y.2d 411, 416, 654 N.Y.S2d 100, 103, 676 N.E. 2d 862, 865 (1996) (nonconforming uses cannot be summarily terminated "[d]ue to constitutional and fairness concerns regarding the undue financial hardship that immediate elimination of nonconforming uses would cause to property owners").

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7. *Grant* has been followed and reaffirmed in multiple Maryland decisions. *Harris v. Mayor and City Council of Baltimore*, 35 Md. App. 572, 578, 371 A.2d 706 (1977).

II. The Ninth Circuit Did Not Square Its Federal Substantive Due Process Analysis with the Decisions of the Washington Supreme Court or Those of Other States.

After recognizing the Washington Supreme Court's articulation of the federal substantive due process right to an amortization period in its May 28, 2008 Memorandum, the Ninth Circuit switched course in its January 7, 2009 order on petition for rehearing to delete its discussion of the Washington cases and substitute citations to federal decisions—cases that pre-dated its May 28, 2008 Memorandum. App., *infra*, 2a.

The Ninth Circuit now cited *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005), for the proposition that "[a] plaintiff challenging land use regulation under a federal substantive due process theory must demonstrate that the regulation 'fails to serve any legitimate governmental objective' rendering it 'arbitrary or irrational.'" App., *infra*, 2a. The Ninth Circuit did not explain why Kenmore Lanes' challenge did not meet that standard; it may be reasonably inferred that the City's unstated, but apparent, purpose of ending card room operations was regarded as serving a legitimate government objective.

The panel's reading of *Lingle* is plainly inconsistent with the Washington Supreme Court decisions describing a federal substantive due process right to an amortization period on termination of a legal nonconforming use and similar decisions in other states. The Washington Supreme Court was satisfied that regardless of the legitimacy of the local government's

purpose, termination of a legal nonconforming use triggered a constitutional right to a reasonable amortization period. The Court explained that nonconforming uses are subject to subsequently enacted reasonable police power regulations and such regulations will only be invalidated when they immediately terminate the use. This is because "a nonconforming use has a 'vested' or 'protected' right to continue without being subject to immediate termination." *Rhod-A-Zalea*, 959 P.2d at 1027. Thus, the Washington Supreme Court held that an ordinance immediately terminating a legal nonconforming was a substantive due process violation *regardless* of the reasonableness of the City's purpose.

Kenmore Lanes will explain below that the Ninth Circuit's reading of *Lingle* is incorrect, and the substantive due process standard is satisfied here because arbitrariness or irrationality of government action can be proved through the rejection of an amortization period, not merely the apparent goal of the government action. For the purposes of judging whether a Writ of Certiorari should issue, however, the split between the Ninth Circuit and the Washington Supreme Court is clear.

III. The Ninth Circuit's Rejection of Kenmore Lanes' Fourteenth Amendment Substantive Due Process Clause Conflicts with this Court's Jurisprudence.

In *Lingle*, this Court clarified the dividing line between Fifth Amendment takings clause claims and Fourteenth Amendment substantive due process claims, explaining that a takings clause challenge "presupposes that the government has acted in pursuit of a valid public purpose," whereas a substantive due process claim seeking invalidation of an allegedly arbitrary regulation is "logically prior and distinct from the question whether a regulation effects a taking." *Lingle*, 544 U.S. at 543. The Court explained that "[n]o amount of compensation can authorize" an arbitrary government action. *Id.* *See also id.* at 548 ("today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process") (Kennedy, J., concurring).

The Court's observation in *Lingle* that arbitrary or irrational regulations may be invalidated as violative of the Fourteenth Amendment due process clause led panels of the Ninth Circuit to resurrect substantive due process claims for property deprivations. "*Lingle* pulls the rug out from under [the Ninth Circuit's] rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct ... and indicates that a claim of arbitrary action is not [a claim precluded by the Fifth Amendment takings clause]." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) (limiting *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)). *See also N. Pacifica LLC*

v. City of Pacific, 526 F.3d 478, 484 (9th Cir. 2008) ("In recent years, substantive due process law in the context of land-use regulation has taken a winding path") (citing *Lingle*, 544 U.S. at 542) (other citations omitted).

In explaining that the *Agins* "substantially advance[s] legitimate state interests" standard is not relevant to a Fifth Amendment taking, *Lingle*, 544 U.S. at 531-32 (citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980)), the Court commented that the "substantially advances" test has "some logic in the context of a due process challenge." *Id.* at 542. In this reference to substantive due process considerations, the Court did not purport to set forth, or to alter, the applicable test in a substantive due process challenge. *See id.*

Nevertheless, the Ninth Circuit apparently read this language to state a standard that government action will satisfy substantive due process standards if the government has a reasonable goal, no matter how arbitrarily it acts in furtherance of that goal. This gives short shrift to the Court's substantive due process cases and the state cases giving constitutional protection to termination of nonconforming uses.

This Court has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (cited by *Lingle*, 544 U.S. at 542). *See also Wolff v. McDonnell*, *418 U.S. 539, 558 (1974)* ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)"). In the substantive context of the due process

clause, protection against arbitrary government action means that government power must not be exercised "without any reasonable justification in the service of a legitimate governmental objective." *Lewis*, 523 U.S. at 846 (citation omitted).

The Ninth Circuit's decision below failed to analyze whether the City had a reasonable justification for the immediate impact of the Ordinance on Kenmore Lanes. After appropriately quoting *Lingle* for the proposition that a government act is invalid if it "fails to serve any legitimate governmental objective," App., *infra*, 2a, the Ninth Circuit made no attempt to apply that standard to assess whether the City had a legitimate government objective for a regulation that would close Kenmore Lanes' business immediately, without any opportunity to recoup its investment.

Rather than offering any analysis, the Ninth Circuit cited a second decision, this one from the Ninth Circuit; *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (challenging the issuance of a building permit within a historic district). App., *infra*, 2a. The Ninth Circuit did not acknowledge that the challenge in *Shanks* concerned an executive action not a legislative one. 540 F.3d at 1088 ("When executive action like a discrete permitting decision is at issue, only 'egregious official conduct can be said to be arbitrary in the constitutional sense'").[8]

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8. The *Lewis* Court explained that the analysis of whether an act is arbitrary differs for legislative actions as opposed to executive actions:

> While due process protection in the substantive sense limits what the government may do in both

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In contrast to the necessary showing of "conscience shocking" behavior that must be proved for an executive action to have violated substantive due process guarantees, *Lewis*, 523 U.S. at 846, a claim that a legislative action violated due process may be proved by a showing that the action complained of has caused an arbitrary or irrational impact. *Cf. Dent*, 129 U.S. at 121-22, 128 (declaring more than 100 years ago that the right to follow any lawful calling, business, or profession "cannot be arbitrarily taken from [persons], any more than their real or personal property can be thus taken" and only finding no substantive due process violation because the legislation at issue set vital minimum skill thresholds for the practice of medicine). *See also Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (legislation banning birth control measures had an unreasonable impact on marital privacy rights).

Likewise, the Ninth Circuit has, on other occasions, recognized that an unjustified denial of a right is an unreasonable impact subject to invalidation. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey*,

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> its legislative . . . and its executive capacities . . . *criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.*

Lewis, 523 U.S. at 846 (emphasis added) (internal citations omitted). *Lewis*, itself, concerned executive action, not legislative. *Lewis* described the long-standing and extremely high standard for invalidating executive action under the due process clause: "[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which *shocks the conscience*." *Id.* (emphasis added).

920 F.2d 1496, 1508 (9th Cir. 1990) (reversing summary judgment in favor of defendant city when the city council had "abruptly changed course and rejected [a land use permit application], giving only broad conclusory reasons"); *See also Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (refusal to issue building permits afforded applicant no "process, let alone 'due' process," amounting to a substantive due process violation).

The Fourteenth Amendment does not itself create rights that are protected from unreasonable impacts of legislative action. *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005). Rather, "entitlements are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* (citations omitted). *See also Lucas*, 505 U.S. at 1030 (same) (citations omitted). The question of whether a state law-created property interest creates a claim of entitlement protected by the due process clause "begins with a determination of what it is that state law provides." *Castle Rock*, 545 U.S. at 757 (declining to defer to the Tenth Circuit's construction of state law because that court "did not draw upon a deep well of state-specific expertise"). As explained above, Washington has long-recognized a property right in the operation of a business, subject to protection under the Fourteenth Amendment from termination without a reasonable amortization period. *Rhod-A-Zalea*, 959 P.2d at 1029; *Thomasson*, 378 P.3d at 443. The Ninth Circuit accepted that nonconforming uses constitute protectable property interests in Washington but failed to explain its departure from Washington's interpretation that the Fourteenth Amendment protected such rights from summary termination.

Where state law has established a clear right, as Washington has here, this Court has considered summary termination of that right to constitute a due process violation. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (cited in *Castle Rock*, 545 U.S. at 757 (water customers who had a state law-created right to water service which could only be terminated for cause asserted a "'legitimate claim for entitlement' within the protection of the Due Process Clause"). In such circumstances, summary deprivation of the right is arbitrary regardless of the reason. Here, the Ninth Circuit's withdrawal of the portion of its May 28, 2008 Memorandum "look[ing] to state law to 'define and determine the range of interests that qualify for protection as property'" (App. *infra*, 7a (citing *Lucas*, 505 U.S. at 1030)), meant that its substituted conclusion that Kenmore Lanes had not met an "exceedingly high burden" was offered without any analysis of the underlying right at issue or of the application of Fourteenth Amendment protections to that right. The record is devoid of any rational reason for summarily terminating Kenmore Lanes, and there is ample evidence that the City Council's decision to make its ban effective in 10 days was arbitrary and irrational.

This Court's resuscitation of the Fourteenth Amendment's due process clause as a means of challenging land use regulations signaled the Court's interest in clarifying the constitutional challenges available in land use regulation contexts. Having reopened the due process door, this Court should grant certiorari to consider the Ninth Circuit's unreasoned rejection of Kenmore Lanes' Fourteenth Amendment amortization period claim which is in conflict with decisions of the Washington Supreme Court.

CONCLUSION

For the reasons stated above a Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 7, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-35801

STAR NORTHWEST INC., a Washington corporation doing business as Kenmore Lanes and 11th Frame Casino,

Plaintiff-Appellant,

v.

CITY OF KENMORE, a Washington municipal corporation; et al.,

Defendants-Appellees.

No. 06-36029

STAR NORTHWEST INC., a Washington corporation doing business as Kenmore Lanes and 11th Frame Casino,

Plaintiff-Appellant,

v.

City of Kenmore, a Washington municipal corporation; et al.,

Defendants-Appellees.

Appendix A

ORDER

Before: B. FLETCHER, PAEZ and N.R. SMITH, Circuit Judges.

The memorandum filed on May 28, 2008 is amended as follows: On pages 4 through 5, delete Section 2 and replace it with the following paragraph:

> 2. Kenmore Lanes argues that the City violated its Fourteenth Amendment right to substantive due process by failing to provide a reasonable amortization period for nonconforming uses banned by Ordinance. We disagree. A plaintiff challenging land use regulation under a federal substantive due process theory must demonstrate that the regulation "fails to serve any legitimate governmental objective," rendering it "arbitrary or irrational." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005); *see also Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir.2008) ("[T]he 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate government purpose." (citation omitted)). Kenmore Lanes has not met this "exceedingly high burden" here, and dismissal of this claim was therefore proper. *See Shanks*, 540 F.3d at 1088.

With the above amendment, the panel has voted to deny the petition for rehearing. The petition for panel rehearing is therefore DENIED. No further petitions for rehearing shall be filed.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 28, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-35801

STAR NORTHWEST INC., a Washington corporation doing business as Kenmore Lanes and 11th Frame Casino,

Plaintiff-Appellant

v.

CITY OF KENMORE, a Washington municipal corporation; KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,

Defendants-Appellees

No. 06-36029

STAR NORTHWEST INC., a Washington corporation doing business as Kenmore Lanes and 11th Frame Casino,

Plaintiff-Appellant,

v.

CITY OF KENMORE, a Washington municipal corporation; KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,

Defendants-Appellees

Appendix B

MEMORANDUM*

Argued and Submitted March 10, 2008
Seattle, WA

Before: B. FLETCHER, PAEZ, N.R. SMITH, Circuit Judges.

Plaintiff-Appellant Star Northwest ("Kenmore Lanes") operates a bowling alley, restaurant, and card room in Kenmore, King County, Washington. In No. 06-35801, Kenmore Lanes appeals the district court's grant of summary judgment to Appellees, the City of Kenmore (the "City") and the Kenmore City Council (the "Council"), in Kenmore Lanes' civil rights action challenging, on federal and state law grounds, the constitutionality of a City ordinance that banned the operation of card rooms within city limits. In No. 06-36029, Kenmore Lanes appeals from the district court's grant of attorneys' fees in the amount of $180,552 to the City.

In challenging the district court's summary judgment ruling,[1] Kenmore Lanes argues that: 1) its card room, the 11th Frame, is a nonconforming use entitled to operate indefinitely under Kenmore Municipal Code

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. We review de novo a district court's decision to grant a motion for partial summary judgment. *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir.2001).

sections 18.20.1860 and 18.75.030; 2) Kenmore Lanes has a federal constitutional right to an amortization period upon termination of its nonconforming use; 3) Kenmore Ordinance 05-0237 (the "Ordinance") violates Kenmore Lanes' substantive due process rights under Washington Constitution, Article I, section 3; and 4) Kenmore Lanes' federal Fifth Amendment takings claim is ripe for adjudication. Finally, Kenmore Lanes argues that 5) the district court erred in denying its request for discovery regarding the City Council's decisionmaking process when it enacted the Ordinance.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. For purposes of this discussion, we assume, without deciding, that following adoption of the Ordinance, Kenmore Lanes' card room qualifies as a nonconforming use within the meaning of Municipal Code section 18.20.1860. The City, however, is not required to allow the card room to operate indefinitely, as Kenmore Lanes asserts. The text of section 18.75.030 is permissive; it states that "[o]nce created pursuant to KMC 18.20.1860, a nonconformance *may* be continued in a manner consistent with the provisions of this chapter." KMC § 18.75.030 (emphasis added). It is well established under Washington law that the City may regulate a nonconforming use with "subsequently enacted reasonable police power regulations." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 959 P.2d 1024, 1029 (1998). The City is not required to allow a non-

2. We review a district court's discovery rulings for abuse of discretion. *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir.1996); *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir.2001).

conforming use to exist indefinitely because "local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses." *Id.* at 1028. The district court correctly granted summary judgment on this issue.

2. Washington courts have recognized a federal constitutional right, under the Fourteenth Amendment's substantive due process guarantee, to a reasonable amortization period for nonconforming uses terminated by state or local regulation. *See State v. Thomasson*, 61 Wash.2d 425, 378 P.2d 441, 443 (1963); *Rhod-A-Zalea*, 959 P.2d at 1029. Kenmore Lanes argues that it is entitled to such an amortization period for the City's termination of its card room operations. Those nonconforming uses that are not vested rights under Washington law, however, are not entitled to the benefit of an amortization period. *See Rhod-A-Zalea*, 959 P.2d at 1029. Under Washington law, a gambling license cannot create a vested right. The Washington Administrative Code provides that "the issuance of any license by the [gambling] commission shall not be construed as granting a vested right in any of the privileges so conferred." WAC § 230-04-175. We look to state law to "define and determine the range of interests that qualify for protection as property" under the Fifth and Fourteenth Amendments. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Accordingly, because Kenmore Lanes cannot, under Washington law, have a vested interest in the continued operation of its card room gambling business, it is not constitutionally entitled to an amortization period.

3. Next, Kenmore Lanes argues that the Ordinance violates its substantive due process rights under Article 1, section 3 of the Washington Constitution. We disagree. Washington courts apply a three-pronged test to determine whether an ordinance violates substantive due process. *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907, 912-13 (1990). Under this test, we consider whether the ordinance 1) is aimed at achieving a legitimate public purpose, 2) uses means that are reasonably necessary to achieve that purpose, and 3) is unduly oppressive on the person regulated. *Edmonds Shopping Ctr. Assoc. v. City of Edmonds*, 117 Wash.App. 344, 71 P.3d 233, 242 (2003). On this record, we agree with the district court that each of these elements weighs against a finding that the Ordinance violates Kenmore Lanes' substantive due process rights, and we conclude that dismissal of this claim was proper. *See id.* at 243; *Paradise, Inc. v. Pierce County*, 124 Wash.App. 759, 102 P.3d 173, 181 (2004).

4. Kenmore Lanes next argues that the district court erred in concluding that its federal Fifth Amendment takings claim was not yet ripe for adjudication. We disagree. A federal takings claim is not ripe until the claimant has sought, and been denied, compensation through state procedures for claims of regulatory takings or inverse condemnation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). We have previously found Washington's mechanism for adjudicating claims of regulatory takings to be adequate and a necessary prerequisite to a federal

takings claim. *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir.1997). Here, it is undisputed that Kenmore Lanes did not take this step prior to filing the instant action in federal court.

Neither of the arguments advanced by Kenmore Lanes persuade us that its takings claim should be exempted from this requirement. While Washington courts have yet to address the impact of *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), on federal takings analysis, it would be premature to conclude that the Washington courts will not, if presented with Kenmore Lanes' takings claim, apply the standard adopted by the Supreme Court in *Lingle*. Furthermore, the Court has solidly rejected the argument that the ripeness rule is unfair because a claimant might be collaterally estopped from litigating its federal takings claim if it pursues state court remedies, and we are bound to do the same here. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 341-48, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005).

5. Finally, Kenmore Lanes challenges three discovery rulings by the district court that limited the scope of discovery regarding the Council's decisionmaking process in adopting the Ordinance because such discovery was relevant and necessary to its claims. It is well-settled, however, that inquiries into a legislator's deliberative process in reaching a particular legislative decision are, absent extraordinary circumstances, prohibited by the "deliberative process" privilege. *See*

City of Las Vegas v. Foley, 747 F.2d 1294, 1297-98 (9th Cir.1984). Our review of the record persuades us that the district court's discovery rulings were narrowly tailored to preclude Kenmore Lanes from inquiring into the individual, subjective motivations of Council members regarding their purpose in adopting the Ordinance and did not prohibit any discovery that would have been relevant to the constitutional claims at issue in this case. Given the discretionary standard of review applicable to discovery rulings, we therefore affirm. *Blackburn*, 100 F.3d at 1436.

Kenmore Lanes also challenges the district court's award of attorneys' fees and costs to the City.[3] First, Kenmore Lanes argues that the district court erroneously interpreted the mandatory filing deadline of Federal Rule of Civil Procedure 54(d)(2). Additionally, Kenmore Lanes argues that the district court erroneously awarded fees for 1) claims on which the City did not prevail and 2) work outside the parties' attorney fee agreement, including work originating in the Office of the City Attorney and time spent responding to public records requests made under the authority of the Washington Public Disclosure Act. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

Kenmore Lanes first argues that the City's motion for attorneys' fees was untimely under Rule 54(d)(2) and,

3. We review for abuse of discretion a district court's award of attorneys' fees, including the amount of the award. *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1059 (9th Cir.2006).

as a result, the district court could not grant the City's untimely motion. We are not persuaded. Regardless of whether the motion was untimely, the district court had discretion to reach the merits of the late motion. The district court noted that the motion was filed four days after the Rule 54 deadline, and that Plaintiff was not prejudiced by the late filing. A district court has broad jurisdiction to grant attorneys' fees and costs. *Davis v. Mason County*, 927 F.2d 1473, 1487 (9th Cir.1991). On this record, we conclude that the district court did not abuse its discretion in reaching the merits of the City's motion for attorneys' fees and costs.

Kenmore Lanes next argues that the district court erred in failing to segregate fees relating to claims on which the City prevailed from fees relating to claims on which it did not prevail. We agree that a defendant is not a "prevailing party" with regard to claims dismissed without prejudice. *See Branson v. Nott*, 62 F.3d 287, 293 (9th Cir.1995) ("Where a complaint has been dismissed for lack of subject matter jurisdiction, the defendant has not prevailed over the plaintiff on any issue central to the merits of the litigation." (internal quotation marks and citation omitted)). We therefore conclude that the district court should not have considered the City the prevailing party with respect to Kenmore Lanes' Fifth Amendment takings claim and its state law gambling tax revenue claim for purposes of calculating attorneys' fees and costs. Accordingly, we reverse the district court's award of attorneys' fees and costs as to those two claims. We remand so that the district court may determine the amount of reasonable fees due the City

for the claims on which it prevailed. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986) (holding that for purposes of claiming a fee award pursuant to 42 U.S.C. § 1988, "counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended.").

Finally, Kenmore Lanes argues that the district court erred by failing to segregate and deny fees for 1) matters originating in the office of the City Attorney and 2) public record requests made by Short, Cressman & Burgess, PLLC. We agree. The district court's order granting the City's motion reflects an award of fees for time spent by the City's attorneys on matters completely unrelated to the litigation between the parties. Because the City is entitled to recover fees only for its attorneys' work on claims on which the City actually prevailed, *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 738 P.2d 665, 682-83 (1987), it was an abuse of discretion for the district court to award those unrelated fees to the City. On remand, the district court should review the City's billing records and should not award fees for time spent on matters unrelated to the claims on which the City was the prevailing party.

***No. 06-35801*: AFFIRMED.**

***No. 06-36029*: REVERSED and REMANDED.**

In No. 06-35801, Appellees shall recover their costs on appeal.

In No. 06-36029, Appellant shall recover its costs on appeal.

APPENDIX C — CORRECTED ORDER ON MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED AUGUST 10, 2006

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C05-2133P

STAR NORTHWEST, INC., d/b/a
KENMORE LANES and 11th FRAME CASINO,

Plaintiff(s),

v.

CITY OF KENMORE, et al.,

Defendant(s).

CORRECTED
ORDER ON MOTION FOR
SUMMARY JUDGMENT

This corrected order of summary judgment seeks to redress errors in the Court's original order (Dkt. No. 90) which were brought to light in Plaintiff's Motion for Reconsideration (Dkt. No. 96). On August 10, 2006, the Court held a telephonic conference in which counsel for all parties (Paul Dayton for Plaintiff, Dan Lossing and Jayne Freeman for Defendants) participated. Although Defendants did not respond in writing to Plaintiff's Motion for Reconsideration, agreement with Plaintiff's

positions on the two issues presented for reconsideration (first, that Plaintiff's Sixth Cause of Action for refund of gambling tax revenues had not been addressed by the summary judgment motion and therefore survived the Court's ruling on that motion; second, that dismissal of Plaintiff's takings claim for non-ripeness should have been without prejudice) was voiced orally.

Defendants City of Kenmore and Kenmore City Council sought an order of summary judgment dismissing Plaintiff's claims against them for enacting an ordinance banning the operation of social card rooms within the Kenmore city limits. Having reviewed the briefing, exhibits and declarations of both sides and having heard oral argument on the motion, the Court found that there were no genuine issues of material fact and that Defendants were entitled to judgment as a matter of law. The Court's corrected order on summary judgment shall be entered as follows:

The Court PARTIALLY GRANTS Defendants' motion for summary judgment and DISMISSES all of Plaintiffs' claims except Plaintiff's Sixth Cause of Action (which was not the subject of Defendants' motion); the dismissed claims shall all be dismissed with prejudice except for Plaintiff's claim that Defendants' action constituted a taking without just compensation, which claim shall be dismissed without prejudice.

Appendix C

BACKGROUND

By statute (the Washington Gambling Act), the state legislature preempted the fields of gambling licensing and regulation. RCW 9.46 .285. The statutory scheme invests a limited authority in the state's counties and cities as regards gambling:

> [A] city . . . may absolutely prohibit, but may not change the scope of license, [*sic*] any and all of the gambling activities for which the license was issued. RCW 9.46.295.

On March 10, 2003, the Kenmore City Council ("the Council") passed an ordinance, No. 03-167, that banned card rooms, but permitted Plaintiffs' operation (the "11th Frame") to remain open under a "grandfather" clause. Def Mtn, Batchelor Decl. at pp. 477-504. In the wake of the decision in *Edmonds Shopping Center Assoc. v. City of Edmonds*, 117 Wn.App. 344 (2003),[1] King County Superior Court Judge Lukens ruled that Defendants could not selectively permit some gambling establishments and not others, but were required to either permit or ban all gambling.

On December 19, 2005, the Council passed Ordinance 05-0237 ("the Ordinance"), prohibiting social

---

1. "Instituting a schedule to phase out existing gambling activities is not absolutely prohibiting gambling activities ... [D]ifferentiating between existing and future uses is more regulatory in nature, thus violating RCW 9.46.925." *Edmonds*, 117 Wn.App. at 358.

card rooms within the City. Batchelor Decl. at pp. 11-18. The termination of existing operations was to be effective immediately (at the end of December 2005), with no grandfathering or amortization period. Plaintiffs filed this lawsuit, alleging causes of action for regulatory taking, violations of state and federal substantive due process and injuries under § 1983. Plaintiffs then filed for a preliminary injunction to permit them to continue operations during the pendency of this litigation; on the eve of the injunction hearing, the parties reached an agreement and the card room has remained in operation throughout the course of this action.

DISCUSSION

Plaintiffs attack the Ordinance on three grounds: (1) the Ordinance results in the card room being transformed into a "legal nonconforming use" which is entitled to continue indefinitely or at least be "reasonably amortized"; (2) the Ordinance works a taking on Plaintiffs' enterprise for which they are entitled to compensation; and (3) the Ordinance is a violation of state and federal substantive due process. This opinion will examine each argument in turn.

Nonconforming use

The Kenmore Municipal Code defines a non-conformance as:

> [A]ny use . . . established in conformance with the city of Kenmore rules and regulations in

> effect at the time of establishment that no longer conforms to the range of uses permitted in the site's current zone ... due to changes in the code or its application to the subject property.

KMC 18.20.1860. Plaintiffs' card room fits the qualifications of a "nonconforming use" under this definition: it was established in the 1970s before the incorporation of the city (Pltfs Decl. of Evans, Dkt. No. 8) and as late as 2003 was permitted to remain in operation by virtue of a "grandfather" clause to an ordinance which otherwise operated to ban card rooms within the city. Batchelor Decl. at pp. 477-504. It is only by virtue of the Ordinance in question that it "no longer conforms to the range of uses permitted in the site's current zone . . ."

The Kenmore development regulations further state that, "[o]nce created pursuant to KMC 18.20.1860, a nonconformance may be continued in a manner consistent with the provisions of this chapter ." KMC 18.75.030. It is Plaintiffs' position that these regulations combine to dictate that the city must permit any nonconforming use to continue indefinitely.

This is not a supportable contention. First of all, the language of KMC 18.75.030 is permissive: ". . . a nonconformance *may* be continued . . ." The language of the Ordinance clearly speaks to an intention *not* to permit card rooms to continue in Kenmore.

Secondly, Plaintiffs' position is at odds with the holding of the leading Washington case on nonconforming uses, *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1 (1988). The Washington Supreme Court observed that "[c]ourts have consistently recognized that nonconforming uses are subject to later enacted reasonable police power regulations." *Id.* At 9 (citations omitted). Clearly, even if Plaintiffs' card room constitutes a legal nonconforming use, Defendant is not constrained from doing anything but permitting the 11th Frame to remain in operation indefinitely.

Plaintiffs, however, claim support from *Rhod-A-Zalea's* holding that "[l]ocal governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period." *Id.* at 10 (citation omitted). Plaintiffs claim that the card room, if not entitled to operate indefinitely, must at least be afforded a "reasonable" time period during which to amortize their loss. In response, Defendant cites to *Edmonds*[2] and a later case (*Paradise, Inc. v. Pierce County*, 124 Wash.App. 759 (2004)[3]) for their holdings that the Washington Gambling Act does not permit the

---

2. "Instituting a schedule to phase out existing gambling activities is not absolutely prohibiting gambling . . . it is regulation." *Edmonds*, 117 Wn.App. at 358.

3. "[B]ecause the County could not regulate gambling, a ban on gaming was the only means available to realize the public purpose of stopping card room gaming." *Paradise*, 124 Wash.App. at 775.

municipalities to "regulate" gambling operations by building in amortization periods or grandfather clauses.

This opinion does not seek to reconcile that apparent conflict; rather the Court finds that the *Rhod-A-Zalea* holding concerning amortization for nonconforming uses does not apply to gambling operations like Plaintiffs'. The protection afforded nonconforming uses springs from the "vested rights" accorded such uses by virtue of the fact that the uses were legal when they originated: "The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a 'protected' or 'vested' right." *Rhod-A-Zalea*, 136 Wash.2d at 6.

But the state has specifically exempted gambling licenses from the creation of any vested rights. The Washington Administrative Code states: "[T]he issuance of any license by the commission shall not be construed as granting a vested right in the privileges so conferred." WAC 230-04-175. Plaintiffs cannot avail themselves of the protections traditionally granted nonconforming uses because they cannot claim a vested right in the continued operation of their gambling operation. Defendants are within their statutory and constitutional authority to exercise their police power by terminating the gaming use immediately.

Appendix C

Takings

Private property shall not be taken for public use, without just compensation. U.S. Constitution, Amendment V. Plaintiffs seek such compensation pursuant to a regulatory taking, but their claim to this constitutional protection suffers from two fatal defects.

The first concerns whether Plaintiffs even have a "private property" interest in their card room operation which the Constitution will protect. In *U.S. and Fed. Communications Commission v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Supreme Court stated that gambling "implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *Id.* at 426. The Court finds that this holding, combined with the WAC admonition that the issuance of a gambling license "shall not be construed as granting a vested right in the privileges so conferred," renders Plaintiff unable to claim a protectable right in the operation of the 11th Frame card room.

In addition to the absence of a constitutionally protected right, Plaintiffs brought this claim directly in federal court. A federal takings claim is not ripe until the claimant has sought, and been denied, compensation through state procedures for such claims. *Williamson Co. Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985). Washington's mechanism for adjudicating claims of regulatory takings has been found adequate and a necessary prerequisite

to a federal takings claim. *Macri v. King County*, 126 F.3d 1125 (9th Cir.1997). Plaintiffs have completely failed to pursue a regulatory takings claim in state court.

Plaintiffs' interpose two objections to this requirement. The first is that the pursuit of such a determination in state court would be "futile" and therefore nonperformance should be excused. Plaintiffs point to the two threshold inquiries that state law takings claims require ("First, whether the regulation destroys or derogates a fundamental property ownership attribute. Second, whether the regulation seeks less to prevent a harm than to impose a requirement to provide an affirmative public benefit." Pltfs Memo, fn. 21.) and then assert, without authority or explanation, that "[t]hey cannot be proved here." *Id.* at p. 15. It is not at all apparent to this Court why this should be the case. In point of fact, the argument that their right to continue operation of the card room is a "fundamental property ownership attribute" is one of the central tenets of Plaintiffs' position in this lawsuit. Plaintiffs fail to establish that pursuing adjudication of their compensation claim through state court would be a futile and useless act.

Plaintiffs' second objection to the standard federal takings claim prerequisite is both theoretical and unpersuasive. Plaintiffs cite to *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491 (2005) and quote the *San Remo* opinion to suggest that the Supreme Court intended to eliminate or somehow disavow the Ninth Circuit's *Macri* holding

requiring the adjudication of a takings claim through the state compensation process. The language which Plaintiffs quote[4] is in fact pre-*Williamson* language and is cited in a context which in no way suggests that an "exhaustion of state remedies" requirement is overly stringent or unfair.

In actuality, there is language in the *San Remo* opinion suggesting the *Williamson* requirement of state exhaustion ought to be re-examined but (as Plaintiffs acknowledge) the language is only found in the concurring opinion and (as careful reading of the selection reveals) it is more in the nature of a musing or a suggestion than a pronouncement with any precedential value. The fact remains that *Williamson* and *Macri* are still valid legal authority and this Court will not accept Plaintiffs' invitation to ignore them. The takings claim is not ripe and will accordingly be dismissed without prejudice.

Both parties provided briefing on whether the action before this Court satisfies the substantive elements of a takings claim. On the basis of the finding that Plaintiffs' takings claim is not yet ripe, this opinion does not reach the merits of that cause of action.

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4. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 125 S.Ct. at 250.

Appendix C

Substantive Due Process

Plaintiffs' federal and state substantive due process claims must be analyzed separately. At both the state and federal levels, a three-part test (with slight variations) is employed. The test considers:

> 1. Whether the regulation is aimed at achieving a legitimate public purpose;
>
> 2. Whether it uses means that are "reasonably necessary" to achieve that purpose (the federal test asks if the means are "rationally related" to the purpose); and
>
> 3. Whether it is unduly oppressive on the landowner.

Edmonds, 117 Wash.App. at 364; *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir.1992).

The Court declines to reach the issue of whether Plaintiffs have a supportable federal substantive due process claim. Defendants cite a line of federal authority which clearly holds that "the scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution." *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir.1996); *see also Squaw Valley Dev. v. Goldberg*, 375 F.3d 936, 948 (9th Cir.2004); *Madison v. Graham*, 316 F.3d 867, 870-71 (Mont.2002) ("Since deciding *Armendariz*, this court has consistently held that

substantive due process claims are precluded where the alleged violation is addressed by the explicit textual provisions of the Fifth Amendment's Takings Clause.").

The *Armendariz* court notes that the Supreme Court has been steadily moving away from extending substantive due process protections to purely economic interests such as those of Plaintiff's. 75 F.3 at 1318. Neither in their briefing nor at oral argument have Plaintiffs responded to this clear federal precedent, and the Court will assume on that basis that Plaintiffs concede the validity and impact of the *Armendariz* rationale. Plaintiffs' federal substantive due process claim will be dismissed.

Plaintiffs fare no better under the state substantive due process analysis:

> 1. ***Legiiimate public purpose***: Plaintiffs argue that, since the Council did not explicitly state a purpose for the Ordinance, this Court must accept Plaintiffs' contention that the purpose was to prohibit the *proliferation* of card rooms. The language of the Ordinance belies that argument—the only rational reading of its wording is that its purpose is to prohibit all card rooms, not merely halt the spread of them.[5] The *Edmonds* court found a

5. And the firmly established *Edmonds/Paradise* precedent prohibiting municipalities from only banning the *future* establishment of card rooms has been discussed at length *supra*.

legitimate public purpose to that municipality's ordinance (a) in the testimony presented at council meetings (although there is evidence that there was testimony from supporters *and* detractors of social card rooms, Plaintiffs do not dispute that there was some sentiment in the community in favor of banning gambling) and (b) in the "historical acceptance of the regulation of gambling as a valid exercise of the police power and the explicit authorization by the Legislature in RCW 9.46.295 to permit municipalities to prohibit gambling absolutely." 117 Wash.App. at 365. The Court finds that Defendants' intention to ban social card rooms represented a legitimate public purpose.

2. ***Reasonably necessary***: *Edmonds* and *Paradise* make it clear that, in the state of Washington, under RCW 9.46.295, anything short of a complete ban would amount to an impermissible "regulation" of gambling. *Edmonds*, at 365; *Paradise*, at 181. The Court finds that the Ordinance was reasonably necessary in order for Defendants to prohibit gambling as they were authorized to do by the Legislature.

3. ***Unduly oppressive***: The leading state case (*Presbytery of Seattle v. King County*, 114 Wn.2d 320 (1990)) lists several factors to consider in weighing oppressiveness:

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a. *The nature of the harm to be avoided*: As has been discussed fully *supra*, gambling has long been considered an activity which is legitimately the subject of the exercise of a municipality's police power;

b. *The availability and effectiveness of less drastic protective measures:* Again, as fully explicated above, the current state of statutory and case law dictates that the municipality which wishes to prohibit gambling is constrained from any "less drastic protective measures" than a complete and immediate ban;

c. *The economic loss suffered by the property owner*: The Court is aware of Plaintiffs' claim that the closing of the card room will doom the associated enterprises of the bowling alley and restaurant which also occupy the property in question. Pltfs Memo, p. 18. However, the Court is mindful of the fact that Plaintiffs still own a valuable piece of commercial property for which many possible profitable uses remain—the effect of Defendants' action has been to restrict one activity, not to deny

Plaintiffs the opportunity to turn the property to any profitable use (as would be the case had the property been turned to use as a public park or wildlife preserve). The Court does not find that the Defendants' proper exercise of its police power for a legitimate public purpose is outweighed by the nature of Plaintiffs' economic loss.

d. *The property owner's ability to anticipate the regulation*: The Court finds some merit in Plaintiffs' contention that their lengthy existence within the community, coupled with the "grandfather" status accorded the 11th Frame in the 2003 ordinance and the fact that as originally written the 2005 ordinance allowed the card room to live out the length of its current license (the final version of the Ordinance eliminated this provision), may have impaired their ability to anticipate the municipality's action. However, these considerations must be balanced against other facts: the existence of the Washington Gambling Act empowering municipalities to prohibit gambling, the 2003 rulings in *Edmonds* and *Paradise* upholding the

> exercise of that power by other municipalities, and Judge Lukens' ruling in the wake of *Edmonds* that Defendants' moratorium was an inappropriate "regulation" of gambling in violation of RCW 9.46.295. Additionally, the finite nature of the gambling license itself—the fact that Plaintiffs had to face a process of reapplication and possible denial of the license annually—constituted some notice that their continued existence was never assured. At best these countervailing factors balance each other out and, in the grand weighing-and-balancing scheme of the test for "undue oppression," they cannot be said to tip the scales in Plaintiffs' favor.

It is the opinion of this Court that an examination of all the factors necessary for establishment of a substantive due process violation under state law yields the conclusion that Plaintiffs have not, as a matter of law, succeeded in making their case for this cause of action. Accordingly, both the federal and state substantive due process claims will be dismissed on summary judgment.

Appendix C

CONCLUSION

Finding no genuine issues of disputed material fact, the Court finds that Defendants are entitled to partial summary judgment as a matter of law. The card room is not entitled to the protections accorded legal nonconforming uses because Plaintiffs have no vested rights in its gambling license or operation. Plaintiffs' takings compensation claim is not yet ripe. The federal courts do not recognize a substantive due process claim where a party has a more specific unjust takings claim and Plaintiffs have not satisfied the conditions for a finding of a substantive due process violation under state law. This order does not dismiss Plaintiffs' Sixth Cause of Action. The remainder of Plaintiffs' claims are hereby DISMISSED; the Ninth Cause of Action is dismissed without prejudice.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: August 10, 2006

s/ Marsha J. Pechman
Marsha J. Pechman
U.S. District Judge

APPENDIX D — CITY OF KENMORE, WASHINGTON ORDINANCE ADOPTED DECEMBER 19, 2005

CITY OF KENMORE
WASHINGTON
ORDINANCE NO. 05-0237

AN ORDINANCE OF THE CITY OF KENMORE, WASHINGTON, PROHIBITING SOCIAL CARD GAMES WITHIN THE CITY; AMENDING CHAPTER 18.20 OF THE KENMORE MUNICIPAL CODE; AMENDING SECTIONS 18.25.040 AND 18.25.070 OF THE KENMORE MUNICIPAL CODE TO PROHIBIT SOCIAL CARD GAMES WITHIN THE CITY; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, the City of Kenmore has adopted a Comprehensive Plan in compliance with the Growth Management Act; and

WHEREAS, gambling activities are not adequately addressed in the City's Comprehensive Plan, Interim Zoning Code or other interim development regulations; and

WHEREAS, in March of 1999, the City Council adopted a moratorium on applications for social card game gambling within the City, and has extended the moratorium every six months until March 20, 2003; and

WHEREAS, Division 1 of the Court of Appeals issued its opinion on June 26, 2003, in *Edmonds Shopping Center*

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Assoc., et al. v. City of Edmonds, affirming that cities may prohibit any or all gambling activities, but calling into question cities' ability to exercise zoning or other general police powers over licensed gambling activities; and

WHEREAS, the Court of Appeals has also ruled that cities lack the authority under current statutory language to "grandfather" existing social card games conducted at premises licensed by the State Gambling Commission or to amortize the continued existence of any such social card games; and

WHEREAS, the Legislature has granted clear authority to the City Council in RCW 9.46.295 to absolutely prohibit within the City of Kenmore any or all gambling activities authorized by the Legislature; and

WHEREAS, the City Council had conducted numerous public meetings and public hearings and has otherwise received significant public comment regarding the city's regulation of legal gambling activities; and

WHEREAS, the City Council desires to adopt an ordinance prohibiting social card games throughout the City pursuant to RCW 9.46.295 and the City Council's constitutional authority to regulate the public health, safety, and welfare in a manner consistent with the general law;

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NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF KENMORE WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Social Card Game Prohibited. Pursuant to RCW 9.46.295, "social card games," as that term is defined in RCW 9.46.0282 as now in effect or may subsequently be amended, are prohibited within the City of Kenmore. Social card games shall not be permitted, maintained or operated as a commercial stimulant for the operation of any business primarily engaged in the selling of food or drink for consumption on the premises, nor for any other reason or under any other circumstances. Nothing in this ordinance shall be construed to otherwise change the scope of any current license issued by the State Gambling Commission.

Section 2. Social Card Game Defined. Chapter 18.20 (Technical Terms and Land Use Definitions) of the Kenmore Municipal Code is amended to add a new definition to read as follows:

18.20.2782 Social Card Game.

"Social card game" is defined as set forth in RCW 9.46.0282, as now in effect or as may be subsequently amended or re-codified.

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Section 3. Permitted Uses - Retail Land Uses. Section 18.25.070(A) (Retail Land Uses) of the Kenmore Municipal Code is amended at SIC Code 58, the table for "Eating and Drinking Places," to read as follows:

18.25.070 Retail land uses.

ZONE	RESOUCE	RESIDENTIAL	COMMERICAL/INDUSTRIAL				
	AGRICULTURE	URBAN RESIDENTIAL	NEIGHBORHOOD BUSINESS	COMMUNITY BUSINESS	REGIONAL BUSINESS	OFFICE	INDUSTRIAL

SIC#	SPECIFIC LAND USE	A	R 1-6	R 12-48	NB	CB	RB	O	I
***	***	***	***		***	***	***	***	***
58	Eating and Drinking Places		C16,21	C16,21	P10,21	P,21	P,21	P,21	P,21
***	***	***	***		***	***	***	***	***

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Section 4. Permitted Uses - Development Conditions. Section 18.25.070(B) (Retail Land Uses - Development Conditions) of the Kenmore Municipal Code is amended to read as follows:

B. Development Conditions.

1. Reserved.

2. Only hardware and garden materials shall be permitted.

3. a. Limited to products produced on-site.

b. Coveted sales areas shall not exceed a total area of 500 square feet.

4. No permanent structures or signs.

5. Limited to SIC Industry No. 5331, Variety Stores, and further limited to a maximum of 2,000 square feet of gross floor area.

6. Limited to a maximum of 2,000 square feet of gross floor area.

7. a. The floor area devoted to retail sales shall not exceed 3,500 square feet.

b. Sixty percent or more of the average annual gross sales of agricultural products sold through the store over a five-year period shall be derived from products grown or produced in the city of Kenmore. At the time of the initial application, the applicant shall submit a reasonable projection of the source of product sales.

c. Sales shall be limited to agricultural produce and plants.

d. Storage areas for produce may be included in a farm store structure or in any accessory building.

e. Hours of operation shall be limited to 7:00 a.m. to 9:00 p.m. during May through September and 7:00 a.m. to 7:00 p.m. during October through April. Outside lighting is permitted if no off-site glare is allowed.

8. Excluding retail sale of trucks exceeding one-ton capacity.

9. Only the sale of new or reconditioned automobile supplies is permitted.

10. Excluding SIC Industry No. 5813 - Drinking Places.

11. No outside storage of fuel trucks and equipment.

12. Excluding vehicle and livestock auctions.

13. Reserved.

14. Not in R-1 and limited to SIC Industry No. 5331 - Variety Stores, limited to a maximum of 5,000 square feet of gross floor area, and subject to KMC 18.30.220.

15. Not permitted in R-1 and limited to a maximum of 5,000 square feet of gross floor area and subject to KMC 18.30.220.

16. Not permitted in R-1 and excluding SIC Industry No. 5813 - Drinking Places, and limited to a maximum of 5,000 square feet of gross floor area and subject to KMC 18.30.220.

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17. Retail sale of livestock is permitted only as accessory to raising livestock.

18. Limited to the R-1 zone.

19. Limited to the sale of livestock feed, hay and livestock veterinary supplies with a covered sales area of not more than 500 square feet. The 500-square foot limitation does not include areas for storing livestock, feed, hay or veterinary supplies or covered parking areas for trucks engaged in direct sale of these products from the truck.

20. a. Covered sales areas shall not exceed a total area of 2,000 square feet.

b. Sixty percent or more of the average annual gross sales of agricultural products sold through the store over a five-year period shall be derived from products grown or produced in the city of Kenmore. At the time of the initial application, the applicant shall submit a projection of the source of product sales.

c. Sales shall be limited to agricultural produce and plants.

d. Storage areas for produce may be included in a farm store structure or in any accessory building.

e. Hours of operation shall be limited to 7:00 a.m. to 9:00 p.m. during May through September and 7:00 a.m. to 7:00 p.m. during October through April. Outside lighting is permitted if no off-site glare is allowed.

21. Social card games, as defined by this Title are prohibited.

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Section 5. Permitted Uses - Recreational/cultural land uses. Section 18.25.040(A) (Recreational/cultural land uses) of the Kenmore Municipal Code is amended at SIC Code 7999, the table for "Amusement and Recreation Services," to read as follows:

		RESOURCE	RESIDENTIAL		COMMERICAL/INDUSTRIAL				
ZONE		AGRICULTURE	URBAN RESIDENTIAL	URBAN RESIDENTIAL	NEIGHBORHOOD BUSINESS	COMMUNITY BUSINESS	REGIONAL BUSINESS	OFFICE	INDUSTRIAL
SIC#	SPECIFIC LAND USE	A	R1-6	R12-48	NB	CB	RB	O	I
	***	***	***	***	***	***	***	***	***
7999 (04) (12)	Amusement and Recreation Services		PR C15 12	PR C15 12		P 12	P 12		
	***	***	***	***	***	***	***	***	***

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Section 6. Permitted Uses - Development Conditions. Kenmore Municipal Code Section 18.25.040(B) (Recreational/cultural land uses - Development Conditions) is hereby amended to read as follows:

B. Development Conditions.

1. The following conditions and limitations shall apply, where appropriate:

a. No stadiums on sites less than 10 acres;

b. Lighting for structures and fields shall be directed away from residential areas;

c. Structures or service yards shall maintain a minimum distance of 50 feet from property lines adjoining residential zones, except for structures in on-site recreation areas required in KMC 18.35.170 and 18.35.180. Setback requirements for structures in these on-site required recreation areas shall be maintained in accordance with KMC 18.30.030;

d. Facilities in the A zones, or in a designated rural forest focus area, shall be limited to trails and trailheads and active recreation facilities, including related accessory uses such as parking and sanitary facilities. Active recreation facilities shall be limited to those properties within the agricultural production district (APD) that are acquired before designation of the APD, using voter-approved recreation funds, state funds mandated for recreation funds or King County board of recreation funds. Active recreation uses allowed on parcels as

noted in this subsection may be transferred to other parcels within the same APD. However, active recreation from lands outside of the APD shall not be relocated to any parcel within an APD. Where those facilities are permitted within an APD, the following deed restrictions shall be applied:

(1) Active recreation uses shall be designed in a manner that visually screens adjacent agricultural uses from park users and that restricts physical trespass onto adjacent agricultural production district properties;

(2) Buildings associated with recreational uses shall be limited to restroom facilities, picnic shelters and storage/maintenance facilities for equipment used on-site;

(3) No use that permanently compacts, removes, sterilizes, pollutes or otherwise materially impairs the future use of the soil for raising agricultural crops shall be allowed;

(4) Any soil surfaces temporarily disturbed through construction activities shall be restored in a manner consistent with agricultural uses, including restoration of the original soil horizon sequence, as soon as practical following the disturbance;

(5) Access to recreational uses shall be designed to minimize impact on the surrounding agricultural production district and should be limited to direct access along district boundaries whenever feasible; and

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(6) Although the recreational use of agricultural production district properties may be long term, the use shall be recognized as an interim use of the production district's prime agricultural soils. As such, any acquisition funding or policy restrictions for the recreational use of the property shall be viewed as subordinate to the city's prior commitment to the preservation of prime agricultural soils and the viability of local agricultural production. If the city declares through action of the city council a critical shortage of agricultural soils to accommodate an active soil-dependent agricultural proposal, the city shall initiate a process to relocate any recreational uses off the subject property and to make the property available for re-establishment of agricultural activities; and

e. Overnight camping is allowed only in an approved campground.

2. Reserved.

3. Reserved.

4. Limited to recreation facilities subject to the following conditions and limitations:

a. The bulk and scale shall be compatible with residential or rural character of the area;

b. For sports clubs, the gross floor area shall not exceed 10,000 square feet unless the building is on the same site or adjacent to a site where a public facility is located or unless the building is a nonprofit facility located in the urban area; and

c. Use is limited to residents of a specified residential development or to sports clubs providing supervised instructional or athletic programs.

5. Limited to day moorage.

6. Adult entertainment businesses shall be prohibited within 330 feet of any property zoned R or containing schools, licensed daycare centers, public parks or trails, community centers, public libraries or churches. In addition, adult entertainment businesses shall not be located closer than 3,000 feet to any other adult entertainment business. These distances shall be measured from the property line of the parcel or parcels proposed to contain the adult entertainment business to the property line of the parcels zoned R or that contain the uses identified in this subsection.

7. Clubhouses, maintenance buildings, equipment storage areas and driving range tees shall be at least 50 feet from residential property lines. Lighting for practice greens and driving range ball impact areas shall be directed away from adjoining residential zones. Applications shall comply with adopted best management practices for golf course development.

8. Limited to a golf driving range as an accessory to golf courses.

9. Reserved.

10. a. Only in an enclosed building, and subject to the licensing provisions of KMC Title 5;

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b. Indoor ranges shall be designed and operated so as to provide a healthful environment for users and operators by:

(1) Installing ventilation systems that provide sufficient clean air in the user's breathing zone, and

(2) Adopting appropriate procedures and policies that monitor and control exposure time to airborne lead for individual users.

11. Only as accessory to a park or in a building listed on the National Register as an historic site or designated as a city of Kenmore landmark subject to Chapter 18.75.KMC.

12. ~~Reserved~~. *Social card games, as defined by this Title are prohibited.*

13. Subject to the following:

a. The park shall abut an existing park on one or more sides, intervening roads notwithstanding;

b. No bleachers or stadiums are permitted if the site is less than 10 acres, and no public amusement devices for hire are permitted;

c. Any lights provided to illuminate any building or recreational area shall be so arranged as to reflect the light away from any premises upon which a dwelling unit is located; and

d. All buildings or structures or service yards on the site shall maintain a distance not less than 50 feet from any property line and from any public street.

14. Excluding amusement and recreational uses classified elsewhere in this chapter.

15. Limited to golf driving ranges and subject to subsection (B)(7) of this section.

16. Subject to the following conditions:

a. The length of stay per party in campgrounds shall not exceed 180 days during a 365-day period; and

b. Only for campgrounds that are part of a proposed or existing city park, which are subject to review and public hearings through the department of parks and recreation's master plan process.

17. Only for stand-alone sports clubs that are not part of a park.

Section 7. Transmittal. The City Clerk is directed to transmit a certified copy of this Ordinance to the State Gambling Commission.

Section 8. Severability. Should any section, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

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Section 9. Effective Date. This Ordinance shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

ADOPTED BY THE CITY COUNCIL AT A REGULAR MEETING THEREOF ON THE 19th DAY OF DECEMBER, 2005.

CITY OF KENMORE

s/ Steven Colwell
Steven Colwell, Mayor

ATTEST/AUTHENTICATED:

s/ Lynn Batchelor
Lynn Batchelor, City Clerk

Approved as to form:
s/ Rod P. Kaseguma
Rod P. Kaseguma, City Attorney

Filed with the City Clerk:	December 13, 2005
Passed by the City Council:	December 19, 2005
Ordinance No.	05-0237
Date of Publication:	December 23, 2005
Effective Date:	December 29, 2005

No. 08-1247

In The
Supreme Court of the United States

STAR NORTHWEST, INC., a Washington corporation d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge,
Petitioner,

v.

CITY OF KENMORE, a Washington municipal corporation, and KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents

May 8, 2009

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QUESTION PRESENTED

1) Whether Petitioner has presented a compelling reason to grant the Petition, where the Ninth Circuit's decision affirming dismissal of a substantive due process claim is consistent with Washington State legislation, regulations, and controlling intermediate appellate decisions specifically prohibiting municipalities from granting amortization periods to cardrooms when enacting a gambling ban, and therefore does not conflict with an earlier State Supreme Court decision generally endorsing amortization periods for other terminated non-conforming uses or present an important question of federal law?

2) Whether Petitioner has presented a compelling reason to grant the Petition, where the issue of granting an amortization period for a cardroom operating on a one-year state license is moot because the cardroom has continued to operate for more than three years since the City banned gambling and the cardroom's original license expired?

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STATUTES INVOLVED

RCW 9.46.010 states the legislative intent of the Washington State Gambling Act of 1973:

> The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.
>
> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; ...

RCW 9.46.285 establishes state preemption of gambling regulation in Washington:

> **Licensing and regulation authority, exclusive.** This chapter constitutes the exclusive legislative authority for the licensing and regulation of any gambling activity and the state preempts such licensing and regulatory functions, except as to the powers and duties of any city, town, city-county, or county which are specifically set forth in this chapter. . . . Any such city, town, city-county, or county may

> thereafter enact only such local law as is consistent with the powers and duties expressly granted to and imposed upon it by chapter 9.46 RCW and which is not in conflict with that chapter or with the rules of the commission.

RCW 9.46.295 establishes limited municipal authority to ban gambling in local jurisdictions:

> **Licenses, scope of authority -- Exception.** Any license to engage in any of the gambling activities authorized by this chapter as now exists or as hereafter amended, and issued under the authority thereof shall be legal authority to engage in the gambling activities for which issued throughout the incorporated and unincorporated area of any county, except that a city located therein with respect to that city, or a county with respect to all areas within that county except for such cities, may absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.

WAC 230-04-175 (in effect until January 1, 2008) states no vested rights in gambling licenses issued by the state gambling commission:

> **License does not grant vested right.** The issuance of any license by the commission shall not be construed as granting a vested right in any of the privileges so conferred.

INTRODUCTION

Start Northwest's Petition for a Writ of Certiorari fails to present a compelling reason to review what is merely a state law dispute dressed up as a federal question. Ignoring Washington State case law and legislation that expressly prohibit cities such as Kenmore from granting the amortization period to which this casino-owner claims it is entitled, Star Northwest cites case law generally discussing pre-termination amortization for other types of non-conforming uses. Not one case rules that local governments are required to provide amortization periods for gambling establishments. In fact, historically gambling has been treated as distinguishable from other property uses, both by Washington and federal courts, and the State of Washington has completely preempted the field of gambling regulation.

A Washington State statute dictates that gambling licenses issued by the State Gambling Commission can last no longer than one year. These licenses create no vested right in a gambling operation. The state legislature has granted local jurisdictions (cities and counties) authority to allow or completely prohibit cardrooms in their jurisdiction—but nothing in between. State law prohibits cities from allowing "sunset clauses" or "amortization" to casinos once they become a prohibited land use. Star Northwest does not challenge this state legislation that guides the City of Kenmore's hand, nor is the State of Washington a party to this action. Surprisingly, the Petition fails to even reference the controlling legislative and appellate authority, despite acknowledging that it is Washington

State law that defines the nature and scope of any potential property right.

Further, the issue presented by Star Northwest has become moot since the Eleventh Frame has already attained an amortization period through litigation. Despite originally challenging the gambling ban because it failed to allow the casino to operate for the remainder of its one-year license, the Eleventh Frame has now continued to operate for more than three years since the City of Kenmore enacted an ordinance to ban cardrooms within its City limits. The gambling license the Eleventh Frame held when the gambling ban was enacted expired at the end of 2006.

Finally, the Petition should be denied because the lower court properly upheld dismissal of Star Northwest's substantive due process claim. Star Northwest challenges the Ninth Circuit's decision based on its lack of detailed written analysis. In reality, the decision to affirm dismissal of the substantive due process claim was so clear it did not warrant lengthy discussion.

COUNTER-STATEMENT OF THE CASE

Contrary to Star Northwest's representation that "the City was apparently not concerned with any impact on gambling at Kenmore Lanes" prior to acting to ban social cardrooms in 2005 (Petition at p. 2), the City Council and citizens of Kenmore consistently expressed concerns about regulating gambling since the City's inception, and the City Council's decision to ban cardrooms occurred after more than seven years of public debate, evaluation, and intervening court decisions limiting the City's options. Kenmore

incorporated as a city in 1998, just one year after Star Northwest purchased the Kenmore Lanes bowling alley and the Eleventh Frame Cardroom. Previously, the cardroom had operated in unincorporated King County, which allowed gambling in its jurisdiction. Upon incorporation, the City of Kenmore began developing its own land use and other regulations, including those applicable to gambling.

For more than six years, the City Council gathered, considered, and analyzed a variety of different options for ways to regulate gambling. As part of this process, the City conducted citizen surveys, held public hearings between 1999 and 2002, and convened special community meetings on the gambling issue in early 2003. During this time period, others announced intentions of opening casinos in Kenmore; consequently, the spector of multiple casinos locating in the City became a concern as most of Kenmore's neighboring cities had already banned gambling. To preserve the status quo during the lengthy comprehensive planning process, the City Council adopted a number of moratoria ordinances, including a moratorium on card rooms. Thus, the Eleventh Frame was the only casino allowed to operate a cardroom in Kenmore from 1998-2003.

Numerous citizens publicly urged the Council to ban all gambling in Kenmore, citing a litany of social and economic effects of gambling on both the private and public level (i.e., gambling addiction, economic and family instability, decreased property values, inconsistence with the City's Vision Statement, and disproportionate reliance on revenue generated by the Eleventh Frame Casino). Others, primarily Kenmore Lanes employees and owners, urged the Council to

"grandfather in" the Eleventh Frame cardroom if a gambling ban were enacted. In 2003, the Council enacted Ordinance No. 03-167, banning cardrooms but allowing the Eleventh Frame a "grandfather clause" to continue operation as the only casino in Kenmore.

Just four months later, the Washington State Court of Appeals decided *Edmonds Shopping Ctr. Assoc. v. City of Edmonds*, 117 Wn.App. 344, 71 P.3d 233 (Wn.App., Div. I, 2003). The *Edmonds* case involved a nearby city that had banned cardrooms pursuant to Washington's Gambling Act of 1973 (RCW 9.46.010, *et seq.*) and attempted to institute a phase-out of then-existing cardrooms (*i.e.*, "Sunset clause" or "amortization"). The *Edmonds* plaintiff challenged the ordinance based on a state statute, under which cities may "absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued." *See, RCW* 9.46.295. The appellate court agreed with the plaintiff that "[i]nstituting a schedule to phase out existing gambling activities is not absolutely prohibiting gambling activities. "... [D]ifferentiating between existing and future uses is more regulatory in nature, thus violating RCW 9.46.295." *Edmonds*, 117 Wn.App. at 358. Based on this interpretation of the state statute, the court ruled that a complete ban on gambling *was* constitutional, but struck down the City's "sunset" clause that exempted existing card rooms in Edmonds from the prospective gambling ban. *Id.*

In light of the *Edmonds* decision, a prospective casino owner (Len Griesel) then sued the City of Kenmore challenging its 2003 decision to "grandfather" the Eleventh Frame Casino but exclude

new cardrooms from opening. The Council then voluntarily repealed the challenged "grandfather" ordinance and adopted another card room moratorium to allow further evaluation. The City Council continued to receive public testimony, conducted an advisory public vote on gambling regulation, and twice extended the moratorium precluding new casinos from locating in Kenmore to compete with the Eleventh Frame. The number of citizens voicing support of a gambling ban in 2004 (49.61%) were essentially equal to the number opposing a ban (50.39%)(many of those only expressing concern about the bowling alley). Meanwhile, the Eleventh Frame continued to operate its cardroom in Kenmore to the exclusion of all others.[1]

In December 2004, the King County Superior Court in Washington ruled in the *Griesel v. Kenmore* case that Kenmore's repeated use of moratoria since 1999, which allowed The Eleventh Frame to continue operating a cardroom as a monopoly for more than five years, constituted an unlawful *regulation* of gambling under Washington State law (*Edmonds, Paradise* and RCW 9.46.295). The court ordered Kenmore to decide whether it wanted to ban or allow *all* gambling when its current moratorium ended in 2005, but ruled that Kenmore could not continue to allow one facility (The Eleventh Frame) to operate while prohibiting others. *Id. See*, Appendix A. Under this direct order from the

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[1] In the meantime, the Washington State Court of Appeals again confirmed that the state Gambling Act allowed cities and counties to completely ban gambling within their jurisdiction and rejected substantive due process challenges under a CR 12(b)(6) standard. *See, Paradise, Inc. v. Pierce County*, 124 Wn.App. 759, 102 P.3d 173 (Wn.App., Div. I, 2004), *rev. den.*, 154 Wn.2d 1027, 120 P.3d 73 (July 13, 2005).

court, the City Council continued deliberating the issue, and held even more public hearings on a potential gambling ban in 2005.

On December 19, 2005, after yet more citizen comment, the Kenmore City Council passed "Agenda Bill No. 05-0237 – Ordinance No. 05-0237 Prohibiting Social Card Games Within the City." Based on RCW 9.46.295, the *Edmonds* decision, the interim decision in *Paradise*, and Judge Lukens' order in the *Griesel* case, the Council was clearly prohibited from allowing The Eleventh Frame to continue operating a cardroom after the ban went into effect, for any length of time. Nor could it lawfully delay enactment of a gambling ban any further, given the specific direction of Judge Lukens. Consequently, the ordinance as passed did not specifically allow The Eleventh Frame a grandfather clause, a sunset period, or an exemption. The ordinance was to go into effect December 29, 2005, but Star Northwest immediately sought and was granted a temporary restraining order by federal district court. As a result, the Eleventh Frame has never ceased its gambling operations since the gambling ban was enacted more than three years ago.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit Court of Appeals Decision Does Not Conflict With a Washington State Supreme Court Decision on an Important Federal Question, and Therefore No Compelling Reason Exists For Granting Review.

Star Northwest's Petition fails to disclose significant controlling case law and legislation, and

establishes no compelling reason for review of the Ninth Circuit panel's 3-0, unpublished decision. Surprisingly, the Petition fails to even mention the specific controlling authority in *Edmonds Shopping Center v. City of Edmonds*, 117 Wn.App. 344, 71 P.3d 233 (Wn.App., Div. I, 2003), *Paradise Inc. v. Pierce County*, 124 Wn.App. 759, 102 P.2d 173 (Wn.App., Div. I, 2004), and the Washington State Gambling Act of 1973 (RCW Ch. 9.46), which render the general propositions set forth in *Rhod-A-Zalea v. Snohomish County*, 959 P.2d 1024 (Wash. 1998) inapplicable. More importantly, this dispute arises solely from legislation unique to the State of Washington, in that the state legislature has chosen to expressly prohibit cities from granting amortization periods for cardrooms such as the Eleventh Frame. Thus, the true dispute at issue in this case is so narrow that no other state or federal jurisdiction would benefit from Supreme Court review.

A. The General Amortization Language In *Rhod-A-Zalea* Is Inapplicable To A Case Controlled By The Washington State Gambling Act.

In *Rhod-A-Zalea*, the Washington Supreme Court addressed whether a nonconforming use (peat mining operation) was subject to later-enacted police power regulations (new grading permit requirement). The case did not involve a gambling operation or a request for an amortization period, and it was undisputed the

plaintiff operated a legal nonconforming use under state and local law.[2]

Contrary to Star Northwest's statement(Petition, p. 17), that "the Washington Supreme Court held that an ordinance immediately terminating a legal non-conforming use was a substantive due process violation *regardless* of the reasonableness of the City's purpose," all references to "amortization" in *Rhod-A-Zalea* were merely dicta. Thus, *Rhod-A-Zalea* does not establish what the State Supreme Court's position would be if faced with the issue of amortization for prohibited gambling operations. *See, State v. Frost,* 160 Wn.2d 765, 775, 161 P.3d 361 (2007)(Washington Supreme Court admonishes not to treat dicta in its rulings as dispositive that do not "answer [] the question[s] presented in the case at bar); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545-546 (2005)(formula repeated in dicta but never the basis for judgment is not owed *stare decisis* weight).

Rather, federal courts are bound by the decisions of a state's intermediate appellate court unless there is *persuasive* evidence that the highest state court would rule otherwise. *See, Six Companies v. Highway Dist.*, 311 U.S. 180 (1940); *West v. AT&T Co.*, 311 U.S. 223, 236-237 (1940)(federal court is not free to reject state rule announced by intermediate appellate state court unless convinced by other persuasive data that the highest court would decide otherwise on same facts).

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[2] In fact, no case cited by Star Northwest involves a gambling operation or any other use deemed "nuisance-like" and traditionally subject to prohibition or suppression. The Petition for Review is devoid of any authority specific to gambling.

And, Washington appellate decisions indicate that gambling activity is subject to a local government's broad power of prohibition or suppression, and even approved gambling activity is a legislative privilege, not an inherent right. See Brief in Opposition, Sections I.B and I.C.

The *Rhod-A-Zalea* court did confirm that any "vested" or "protected" right to continue a nonconforming use, and a local government's corresponding authority to limit or terminate nonconforming uses, are only as broad as "applicable enabling acts" and the Constitution. *Id.*, 136 Wn.2d 7. Here, the Washington State Gambling Act of 1973 is the enabling act that controls any right Star Northwest may have to operate a cardroom and the scope of Kenmore's authority to regulate gambling within its City limits. That statute, and case law interpreting its application, allows cities to ban gambling but not to allow amortization periods for cardrooms. As discussed below, there is simply no constitutionally-protected property right in the continued operation of a gambling business.

B. The State of Washington Expressly Prohibits Amortization Periods For Cardrooms, and Municipalities Must Follow Specific State Statutes and Controlling Authority That Provide Exceptions To General Principles of Law.

Under Article XI, Section 11 of the Washington State Constitution, a city may make "all such local police...regulations as are not in conflict with general laws." Local regulation yields to a state statute when "conflict exists such that the two cannot be

harmonized" and the local regulation "permits or licenses that which the statute forbids and prohibits, and vice versa." *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.3d 273 (1998). An ordinance that conflicts with state law is invalid. *Schulz v. Snohomish County*, 101 Wn.App. 693, 5 P.3d 767 (2000); Washington Constitution Article XI, §11.

The State of Washington expressly created and defined the limited scope of any right to operate a cardroom, and correspondingly established the scope of local authority to regulate them. RCW 9.46.0325 authorizes social card games, but only when licensed and operated in accordance with Chapter 9.46 RCW. Only the Washington State Gambling Commission has authority to issue a license to operate a social card game, and only **for a period not to exceed one year**. RCW 9.46.070. See, Appendix B.

The Washington State legislature has completely preempted the field of licensing and regulating gambling activities with the exception that:

> **Licenses, scope of authority -- Exception.** . . . a city located therein with respect to that city, or a county with respect to all areas within that county except for such cities, may absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.

RCW 9.46.295; *see also,* RCW 9.46.285.

Pursuant to RCW 9.46.295, a city may absolutely prohibit a gambling activity within its boundaries, but if the city does so, it may not authorize existing

gambling activities to continue, or create a schedule to phase out existing activity. Under Washington law, any local prohibition must apply equally to all future and existing gambling activity. *Edmonds Shopping Ctr Assoc. v. City of Edmonds*, 117 Wn.App. 344, 358, 71 P.3d 233 (2003)(upholding gambling ban but striking down City's attempt to treat existing casinos as non-conforming uses and grant amortization period); *Paradise Inc. v. Pierce Cty.*, 124 Wn.App. 759, 102 P.2d 173 (Wn.App., Div. I, 2004). In enacting Ordinance No. 05-0237, which parallels the statutory language, Kenmore appropriately exercised the authority expressly delegated to it by the state in RCW 9.46.295.

The Washington Supreme Court did not review either the *Edmonds* or *Paradise* decisions. Neither appellate opinion referenced *Rhod-A-Zalea*, despite being decided five and six years after *Rhod-A-Zalea* was issued. Both decisions rejected substantive due process claims based on the Washington State Constitution, which is more restrictive than the corresponding Fourteenth Amendment of the United States Constitution in protection of substantive due process rights.

C. The General Rule in *Rhod-A-Zalea* Regarding Amortization Assumes The Existence of A Constitutionally-Protected Property Right; The Eleventh Frame Did Not Have A Constitutionally Protected Right In A Gambling Operation.

Gambling activities are significantly different from other activities. As stated by this Court, gambling "implicates **no constitutionally protected right**;

rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *U.S. and Fed. Commun. Comm'n v. Edge Broadcasting Co.*, 509 U.S. 418, 426, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).[3]

Washington law regarding gambling activity is in accord. Gambling operations are characterized as falling within the category of activities involving a "social or economic evil", that are subject to a local government's broad power of prohibition or suppression. *Northwest Greyhound Kennel Assoc., Inc. v. State*, 8 Wn.App. 314, 320-1, 506 P.2d 878 (1973).

> Social or economic evils, such as gambling, and other activities which jeopardize the public health and safety, are subject to the legislature's prohibition, some absolute and others conditional. *Tarver v. City Comm'n.*, 72 Wn.2d 726, 731-33, 435 P.2d 531 (1967). Proscriptions imposed upon gambling activity are entirely within the legislative domain and are essentially immune from judicial interpretation. *Northwest Greyhound Kennel Ass'n., Inc. v. State*, 8 Wn.App. 314, 506 P.2d

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[3] *Carolina-Virginia Racing Ass'n v. Cahoon*, 214 F.2d 830, 833 (4th Cir. 1954)("no property right to engage in gambling contrary to state law"); *Payne v. Fontenot*, 925 F.Supp 414 (1995)(no property or liberty interest in gaming license under statute making license a privilege within state's discretion, and no right to earn a living by operating gaming establishment); *Jacobsen v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)(no protectible property interest in gaming license based on statute allowing denial for any cause deemed reasonable); *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989).

878 (1973). Consequently, **any approved gambling activity is a legislative privilege and not an inherent right.**

State v. Gedarro, 19 Wn.App. 826, 829, 579 P.2d 949 (1978)(*emph. added*); *Paradise,* 124 Wn.App. at 772-3. Most recently, in holding that an amendment to Washington's Gambling Act regarding internet gambling did not violate the federal Constitution's Commerce Clause, a Washington appellate court noted that "it is critical to recognize that ... Washington from its inception considered gambling to be an activity with significant negative effects and has always strictly regulated gambling" and then held "[p]ut simply, Washington has a longstanding and legitimate interest in tightly controlling gambling. That interest is a pure exercise of the traditional police power, and is justified by the State's desire to safeguard its citizens both from the harms of gambling itself and from professional gambling's historically close relationship with organized crime." *Rousso v. State*, 204 P.3d 243, ___ (Wn. App. Div. I, March 23, 2009)("all 'gaming' generally has long been considered to fall 'within the category of social and economic evils' that are the natural subject of government regulation").[4]

The purpose of allowing an amortization period for a nonconforming use is to provide the property owner the opportunity to recognize its investment and

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[4] *See also*, McQuillin, *The Law of Municipal Corporations* § 24.129 (3rd Ed. 1997)("The maintenance of a gaming house is a public nuisance or a nuisance per se, at common law and usually under statute, at least where it is maintained in violation of law; and as such it is subject to abatement by injunction.").

alleviate what might otherwise be a harsh result. However, as noted in *Paradise, Inc. v. Pierce County:*

> RCW 9.46.295 clearly and specifically stated that the [municipality] could ban all gambling at any time. There is no guarantee in the statute that any gambling operation could recoup its investment if gambling was banned.

Paradise, 124 Wn.App. at 776.

Just like the plaintiff in *Paradise,* Star Northwest has been on notice since the enactment of RCW 9.46.295 (before Star Northwest purchased the Eleventh Frame Cardroom) that the City of Kenmore had authority to absolutely prohibit its card room business at any time. Simply put, Star Northwest had no vested or constitutionally-protected property right to operate a card room for any length of time.

In fact, when Star Northwest was issued its one-year license in 2005, and when the City enacted its ordinance prohibiting cardrooms, state licensing regulations specifically warned applicants: "**the issuance of any license by the commission shall not be construed as granting a vested right in the privileges so conferred.**" Washington Administrative Code (WAC) 230-04-175 (emphasis added). See Appendix C. Washington Administrative Code regulations carry the force of law in Washington. *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (Wash. 2008). WAC 230-04-175 is consistent with and simply confirmed the common law that a person has no right in the continued operation of a gambling business or license, constitutional or otherwise. Chapter 9.46 RCW specifies that a social

card game may only be operated when licensed and operated pursuant to the regulations adopted under Chapter 9.46. *RCW 9.46.0325*; see also *RCW 9.46.285* (limiting cities to enacting only such local laws that are consistent with Chapter 9.46 and not in conflict with "rules of the commission"). The non-conforming uses at issue in *Rhod-A-Zalea* did not suffer similar statutory restrictions.

Only after the Ninth Circuit issued its decision upholding dismissal of the claims below, Star Northwest subsequently argued (in a petition for rehearing) that WAC 230-04-175 should be disregarded because it was repealed more than two years after Kenmore's gambling ban was enacted. Even assuming this change would impact the decision below, newly amended administrative regulations are presumed to have prospective—not retroactive—application in Washington. *Champagne*, 163 Wn.2d at 79 (where "the rule revision affects a substantive or vested right" the amendments are only applied prospectively). The 2008 repeal of WAC 230-04-175 would not be applied retroactively to Kenmore's ordinance enacted in 2005, as the administrative regulation specifically addresses the status of "vested rights." In any event, issues of interpretation and application of state statutes, regulation, and case law are matters of Washington State law that do not implicate important questions of federal law.

No case cited by Star Northwest holds that a "nonconforming use" that consists of a nuisance-like activity, such as gambling, gives rise to a constitutional right to an amortization period; nor do they address the situation where a specific state statute and specific controlling legal authority

expressly hold that the City cannot grant the amortization period for a cardroom that Star Northwest requests here. The lack of any such authority reflects the absence of an important issue of federal law requiring clarification by this Court.

II. The Issue of Whether the City of Kenmore's Ordinance Violated the Fourteenth Amendment by Immediately Terminating Gambling Activities Is Moot Because The Eleventh Frame Cardroom Has Continued To Operate For More Than Three Years After Enactment of The Ordinance.

Star Northwest's Petition to review the right to an amortization period for the Eleventh Frame cardroom should be denied as moot. *Arizonians for Official English v. Arizona*, 520 U.S. 43, 67 (1997)(live controversy must exist at all stages of certiorari review). Star Northwest does not challenge the City of Kenmore's Ordinance on the grounds that it is substantively unconstitutional, but rather because the gambling ban was intended to become effective within ten days of its enactment in 2005. The basis for this challenge no longer exists, as the Eleventh Frame cardroom has continued to operate for more than three years since then.

Through a series of temporary injunctions and stays obtained through litigation, the Eleventh Frame's profitable gambling monopoly has now continued to operate for three more years since the Ordinance was enacted. This is well past the initial "one year" Star Northwest initially requested as amortization to complete the term of the state gambling license it held at the time. *See, Taylor v.*

McElroy, 360 U.S. 709 (1959)(when employee was granted security clearance, his suit for such clearance became moot). *See also, Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004)(one year amortization period sufficient for zoning changes phasing out lucrative adult entertainment uses protected by First Amendment); *Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (Wash. 1978)(90-day amortization period sufficient for zoning changes requiring adult theaters to change location or cease displaying adult films).

Regardless of the status of WAC §230-04-175, it is undisputed that any alleged "vested right" in Star Northwest's cardroom license and gambling operation would have expired more than two years ago—on December 31, 2006. *See*, RCW 9.46.070 (statutorily limiting gambling license to one-year period). *See, Paradise, Inc. v. Pierce County*, 124 Wn.App. 759, 102 P.3d 173, 182 (Wn.App. Div. I, 2004)("RCW 9.46.295 clearly and specifically stated that the County could ban all gambling at anytime," and therefore the fact the casino may loose money on its investment did not effect an injustice).

III. The Ninth Circuit Properly Decided That The City of Kenmore's Gambling Ban Does Not Violate Substantive Due Process Rights Under The Fourteenth Amendment.

No decision of this Court, any Circuit Court of Appeals, or the Washington State Supreme Court suggests that a local legislative decision to prohibit gambling in compliance with state law, with or

without an amortization period, violates the Fourteenth Amendment.

Star Northwest's attack on the Ninth Circuit's decision focuses on its form over substance, citing the Court's "failure to explain" its analysis as a reason compelling review. However, summary judgment decisions are reviewed *de novo*, and can be affirmed on "any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957). Here, several bases exist for rejecting Star Northwest's federal substantive due process claim, and any one of them is sufficient for affirming this decision.

In 2006, the District Court rejected Start Northwest's substantive due process claim based on the preclusion set forth in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). The District Court went on to rule that Star Northwest also failed to establish a violation of the Washington State constitution's substantive due process clause, a standard similar but more stringent than the federal standard. *See, Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992)(rather than use the "reasonably necessary standard employed by Washington State, federal courts apply the lower "rational basis" test for satisfying due process concerns); compare, *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990)(Washington's three-pronged constitutional due process test).

Further, although *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856-57 (9th Cir. 2007) does narrow the *Armendariz* ruling, the Court ruled that the Fifth Amendment still does subsume and preclude a substantive due process claim, as held in

Armendariz, where the alleged conduct is actually covered by the Takings clause. Entitlement to an amortization period as a means of obtaining compensation has no bearing on the crux of the due process issue—whether substance of the underlying governmental action is patently impermissible, *i.e.*, "having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 858, *citing*, *Spoklie v. Montana*, 411 F.3d 1051, 1057 (9th Cir. 2005) and *Equity Lifestyle Pty, Inc. v. County of San Luis Obispo*, 548 F.3d 1184 (9th Cir. 2008)(post-*Lingle* decisions). In such cases, the remedy is to invalidate the ordinance itself as "no amount of compensation can authorize such action." *Lingle v. Chevron USA, Inc.* 544 U.S. 528, 543-544 (2005). And here, Star Northwest has already had a three-year "amortization period" since the City's adoption of the Ordinance.[5]

On appeal in 2008, the Ninth Circuit did not address the preclusion issue, but rejected the substantive due process claim because WAC 230-04-175 expressly prohibited a vested right in a gambling license. In 2009, the Ninth Circuit added that Star Northwest also failed to demonstrate the City's gambling ordinance was arbitrary and irrational as required by *Lingle*. Either reason sufficiently disposes of Star Northwest's Fourteenth Amendment substantive due process claim.

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[5] Star Northwest is also pursuing a Takings claim which was dismissed without prejudice as not ripe for failure to first pursue state law remedies. Star Northwest subsequently re-filed its Takings claim in a state court action, which is currently stayed pending resolution of this appeal.

First, the Ninth Circuit properly looked to Washington State law to determine the scope of any right to continue a non-conforming gambling operation, and found an administrative regulation stating the gambling licenses do not create a vested right in the privilege of operating a casino. *See*, WAC 230-04-175. These regulations were adopted pursuant to the State Gambling Act, which also puts would-be casino owners on notice that cities have the authority to ban gambling activities at any time within their jurisdiction. RCW 9.46.295. The state appellate court decisions in *Paradise* and *Edmonds*, clarify that cities such as Kenmore are not allowed to provide amortization periods for casinos. That no other non-conforming land use is subject to such specific state law restrictions more than adequately explains the Ninth Circuit's alleged "departure" from case law discussing in general the termination of "protectable property interests." Petition, p. 22.

Second, even in the absence of WAC 230-04-175, the Ninth Circuit properly held that Star Northwest fails to demonstrate Kenmore's ordinance "fails to serve any legitimate governmental objective" rendering it "arbitrary or irrational" as required by *Lingle,* 544 U.S. 528, 542 (2005). Both the district court (Petition, App. C, pp. 23a-27a) and the appellate panel (Petition, App. B, p. 7a) found the undisputed record established the gambling ban was 1) aimed at achieving a legitimate public purpose (preventing proliferation of cardrooms); 2) uses means reasonably related to achieve that purpose (complete ban was City's only option pursuant to state law); and 3) not unduly oppressive to Star Northwest (ordinance only restricts one activity, it does not eliminate value of the property, and could be anticipated). Thus, the

ordinance satisfied the strict substantial due process standards established by the Washington State Constitution.

The standard for establishing a Fourteenth Amendment violation is much higher than a substantive due process claim under the Washington State Constitution, in that the federal constitution requires proof that the ordinance is "clearly arbitrary and unreasonable," having no relation to public health, safety, morals, or general welfare. *See, Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995). It is enough that there is an evil at hand that *might be thought* that the particular legislative measure was a rational way to correct it. *So. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 508 (9th Cir. 1990)(*quoting*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)).

The timing of enactment of the gambling ban was far from arbitrary or irrational, as the City of Kenmore was under court order to stop granting the Eleventh Frame/Star Northwest "preferential treatment" by "allow[ing] some gambling (the current license holder) and ban[ning] other gambling (the plaintiff)," noting that "this unequal status cannot continue and is contrary to the spirit and intent of RCW 9.46.225." The King County Superior Court unequivocally ordered the City of Kenmore: "At the end of the six month renewal period [in 2005] the City must take action under RCW 9.46.295 and either ban or permit all gambling activities in the City." *See*, Order, App. A, p. 4.

The City Council thus voted on the gambling ban in December of 2005, pursuant to direction of Court. Any

attempt to delay the effective date of the ordinance would have constituted a violation of this state Court Order directing the City to stop providing "preferential treatment" to the Eleventh Frame cardroom, and any attempt to create an amortization period for existing gambling would have violated RCW 9.46.295. Thus, the Ninth Circuit properly affirmed dismissal of Star Northwest's substantive due process claim; the Ninth Circuit's decision does not misread or conflict with *Lingle*, or any other federal decision.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

DATED this 8th day of May, 2009.

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

N0.03-2-37877-1 SEA

[Dated December 2004]

LEN GRIESEL,	)
	)
Plaintiff	)
	)
vs.	)
	)
CITY OF KENMORE,	)
	)
Defendant	)
	)

MEMORANDUM OPINION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came on for hearing on the Plaintiff's Motion for Partial Summary Judgment Against the City of Kenmore. The parties have submitted memoranda and exhibits in support of and in opposition the motion and presented oral argument.

DISCUSSION

This case presents a conflict between the power of the City of Kenmore (the "City") to enact moratoria under RCW 36.70A.390 and RCW 35A.63.220 and the power of the City to control gambling under RCW 9.46.295.

The facts are not in substantial dispute. For over five years the City has effectively prevented the Plaintiff, and presumably others, from applying for gambling licenses through the use of a series of moratoria. During this period of time a pre-existing gambling licensee has continued to operate. While the parties may differ on the applicability of a moratorium in the first instance, they both agree that a validly enacted moratorium cannot continue indefinitely and that a court has the authority to determine when a moratorium has been in place for too long a period.

The current moratorium is contained in Ordinance No. 04-0207, effective on July 22, 2004, with an expiration date of January 22, 2005. It is instructive to compare the preamble of this ordinance with the preamble of the first moratorium ordinance adopted in 1999. The preamble of Ordinance No. 04-0207 states:

> WHEREAS, the City of Kenmore has adopted a Comprehensive Plan in compliance with the Growth Management Act; and
>
> WHEREAS, gambling activities are not adequately addressed in the City's Comprehensive Plan, interim Zoning Code, or other interim development regulations; and

WHEREAS, the City of Kenmore desires to ensure that the location of such uses is fully and completely analyzed in conjunction with development of the Comprehensive Plan and development regulations required under the Growth Management Act; and

WHEREAS, the City of Kenmore also wishes to ensure public input on these issues; and

WHEREAS, the City desires to preserve the status quo for a period of time to study such uses and address the same; and

WHEREAS, the City desires to preserve the status quo during its time of study by establishing a moratorium on the filing of applications for building and other permits for food or drink establishments desiring to conduct social card game gambling activities, whether as a principal use or as an accessory use, or desiring to expand their existing social card game gambling activities, whether as a principal or an accessory use.

The first moratorium was enacted in Ordinance No. 99-0062 which was adopted on April 26, 1999. Its preamble is identical in all material respects to the Ordinance No. 04-0207 preamble, quoted above.

Similarly, the operative portions of Ordinance 04-0207 are nearly identical to the operative portions of Ordinance 99-0062. Both make the same reference to the scope of the moratorium and both provide for the establishment of a work program to address issues related to social card game and other gambling

activities and to develop proposals for amendment of the Comprehensive Plan, Zoning Code and other development regulations.

During the five years following enactment of the first moratorium the City has enacted additional moratoria as it assessed the impact of *Edmonds Shopping Center Assoc. v. City of Edmonds*, 117 Wn. App. 344, 71 P. 3d 233 (2003), debated the issue on the city council, sought legislative solutions, and conducted a public vote in the fall of 2003, wherein a majority of voters supported the existence of gambling activities. Yet no comprehensive plan or zoning code amendments have been adopted and the City seems no closer to resolving the gambling issue today than it was in 1999.

While the studies have been conducted, the existing use has continued and the Plaintiff and other potential businesses have been barred from even submitting an application. This result is contrary to the spirit and intent of RCW 36.70A.390 and RCW 35A.63.220 which contemplates a time limited study period. This limitation is inherent in the moratorium statutes themselves which provide far an initial six month or one year period. Renewals then can occur in six month intervals, with a public hearing. The fact that renewals are limited in time leads to the conclusion that serial renewals, in one form or the other, for over eight such six month periods, are not appropriate.

This view is shared by the court in *Matson v. Clark County*, 79 Wn. App 641, 644, 904 P. 2d 317 (1995) where the court recognized the emergency, temporary, and expedient nature of moratorium regulations and

by Professor Settle, who, while commenting on interim zoning, concludes that:

> Since the preferential judicial treatment of interim zoning is based upon its temporary and emergency nature, it is vulnerable if there is not an ascertainable time limit on its duration which is rational in light of the emergency it addresses. Richard L. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.13, at 74 (ed. 1983).

In this case, the moratorium has been anything but temporary and whatever emergency existed in 1999 has surely passed. In fact, after five years the City has engaged in an extensive political process and most certainly has all of the information it needs to make a reasoned decision. There is no further need for status quo preservation.

RCW 9.46.225 does not prevent the city from engaging in a land use and political dialogue over the appropriateness of gambling in the City or from preserving the status quo while it does so. The statute, however, does require that a decision be made – either all gambling is banned or all gambling is permitted, with locational and other limits as permitted by the Growth Management Act and applicable zoning statutes. Currently, the moratorium effectively allows some gambling (the current license holder) and bans other gambling (the Plaintiff) – this unequal status cannot continue and is contrary to the spirit and intent of RCW 9.46.225.

Recognizing the authority of the City under RCW 36.70A.390 and RCW 35A.63.220 and also recognizing

that the stated purposes of the current moratorium are the same as first stated in April, 1999, it is time for closure of the study and political process.

Accordingly, Ordinance No. 04-0207 may be extended for one additional six month period after January 22, 2005 (assuming the statutory perquisites to renewal are satisfied) so the City may complete its planning process, take into account the full ramifications of the public vote, and pursue any other policy choices that are available. At the end of the six month renewal period the City must take action under RCW 9.46.295 and either ban or permit all gambling activities in the city.

Nothing in this Opinion, however, is intended to suggest what locational and other limits might be appropriate or permitted under the Growth Management Act or other applicable zoning or comprehensive planning statute or ordinance.

CONCLUSION

As provided and limited by this Memorandum Opinion, the Plaintiff's Motion for Partial Summary Judgment is Granted.

DONE IN OPEN COURT this __ day of December, 2004.

_____

Terry Lukens
Judge

APPENDIX B

Revised Code of Washington (RCW)
Chapter 9.46 RCW [Excerpts]
Gambling – 1973 Act

9.46.010 Legislative declaration.

The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.

It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

The legislature further declares that the raising of funds for the promotion of bona fide charitable or nonprofit organizations is in the public interest as is

participation in such activities and social pastimes as are hereinafter in this chapter authorized.

The legislature further declares that the conducting of bingo, raffles, and amusement games and the operation of punch boards, pull-tabs, card games and other social pastimes, when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto, are hereby authorized, as are only such lotteries for which no valuable consideration has been paid or agreed to be paid as hereinafter in this chapter provided.

The legislature further declares that fishing derbies shall not constitute any form of gambling and shall not be considered as a lottery, a raffle, or an amusement game and shall not be subject to the provisions of this chapter or any rules and regulations adopted hereunder.

The legislature further declares that raffles authorized by the fish and wildlife commission involving hunting big game animals or wild turkeys shall not be subject to the provisions of this chapter or any rules and regulations adopted hereunder, with the exception of this section and RCW 9.46.400.

All factors incident to the activities authorized in this chapter shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end.

[1996 c 101 § 2; 1994 c 218 § 2; 1975 1st ex.s. c 259 § 1; 1974 ex.s. c 155 § 1; 1974 ex.s. c 135 § 1; 1973 1st ex.s. c 218 § 1.]

9.46.070 Gambling commission — Powers and duties.

The commission shall have the following powers and duties:

(1) To authorize and issue licenses for a period not to exceed one year to bona fide charitable or nonprofit organizations approved by the commission meeting the requirements of this chapter and any rules and regulations adopted pursuant thereto permitting said organizations to conduct bingo games, raffles, amusement games, and social card games, to utilize punch boards and pull-tabs in accordance with the provisions of this chapter and any rules and regulations adopted pursuant thereto and to revoke or suspend said licenses for violation of any provisions of this chapter or any rules and regulations adopted pursuant thereto: PROVIDED, That the commission shall not deny a license to an otherwise qualified applicant in an effort to limit the number of licenses to be issued: PROVIDED FURTHER, That the commission or director shall not issue, deny, suspend, or revoke any license because of considerations of race, sex, creed, color, or national origin: AND PROVIDED FURTHER, That the commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(2) To authorize and issue licenses for a period not to exceed one year to any person, association, or organization operating a business primarily engaged in the selling of items of food or drink for consumption on the premises, approved by the commission meeting the requirements of this chapter and any rules and regulations adopted pursuant thereto permitting said

person, association, or organization to utilize punch boards and pull-tabs and to conduct social card games as a commercial stimulant in accordance with the provisions of this chapter and any rules and regulations adopted pursuant thereto and to revoke or suspend said licenses for violation of any provisions of this chapter and any rules and regulations adopted pursuant thereto: PROVIDED, That the commission shall not deny a license to an otherwise qualified applicant in an effort to limit the number of licenses to be issued: PROVIDED FURTHER, That the commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(3) To authorize and issue licenses for a period not to exceed one year to any person, association, or organization approved by the commission meeting the requirements of this chapter and meeting the requirements of any rules and regulations adopted by the commission pursuant to this chapter as now or hereafter amended, permitting said person, association, or organization to conduct or operate amusement games in such manner and at such locations as the commission may determine;

(4) To authorize, require, and issue, for a period not to exceed one year, such licenses as the commission may by rule provide, to any person, association, or organization to engage in the selling, distributing, or otherwise supplying or in the manufacturing of devices for use within this state for those activities authorized by this chapter;

(5) To establish a schedule of annual license fees for carrying on specific gambling activities upon the

premises, and for such other activities as may be licensed by the commission, which fees shall provide to the commission not less than an amount of money adequate to cover all costs incurred by the commission relative to licensing under this chapter and the enforcement by the commission of the provisions of this chapter and rules and regulations adopted pursuant thereto: PROVIDED, That all licensing fees shall be submitted with an application therefor and such portion of said fee as the commission may determine, based upon its cost of processing and investigation, shall be retained by the commission upon the withdrawal or denial of any such license application as its reasonable expense for processing the application and investigation into the granting thereof: PROVIDED FURTHER, That if in a particular case the basic license fee established by the commission for a particular class of license is less than the commission's actual expenses to investigate that particular application, the commission may at any time charge to that applicant such additional fees as are necessary to pay the commission for those costs. The commission may decline to proceed with its investigation and no license shall be issued until the commission has been fully paid therefor by the applicant: AND PROVIDED FURTHER, That the commission may establish fees for the furnishing by it to licensees of identification stamps to be affixed to such devices and equipment as required by the commission and for such other special services or programs required or offered by the commission, the amount of each of these fees to be not less than is adequate to offset the cost to the commission of the stamps and of administering their dispersal to licensees or the cost of administering such other special services, requirements or programs;

(6) To prescribe the manner and method of payment of taxes, fees and penalties to be paid to or collected by the commission;

(7) To require that applications for all licenses contain such information as may be required by the commission: PROVIDED, That all persons (a) having a managerial or ownership interest in any gambling activity, or the building in which any gambling activity occurs, or the equipment to be used for any gambling activity, or (b) participating as an employee in the operation of any gambling activity, shall be listed on the application for the license and the applicant shall certify on the application, under oath, that the persons named on the application are all of the persons known to have an interest in any gambling activity, building, or equipment by the person making such application: PROVIDED FURTHER, That the commission shall require fingerprinting and national criminal history background checks on any persons seeking licenses, certifications, or permits under this chapter or of any person holding an interest in any gambling activity, building, or equipment to be used therefor, or of any person participating as an employee in the operation of any gambling activity. All national criminal history background checks shall be conducted using fingerprints submitted to the United States department of justice-federal bureau of investigation. The commission must establish rules to delineate which persons named on the application are subject to national criminal history background checks. In identifying these persons, the commission must take into consideration the nature, character, size, and scope of the gambling activities requested by the persons making such applications;

(8) To require that any license holder maintain records as directed by the commission and submit such reports as the commission may deem necessary;

(9) To require that all income from bingo games, raffles, and amusement games be recorded and reported as established by rule or regulation of the commission to the extent deemed necessary by considering the scope and character of the gambling activity in such a manner that will disclose gross income from any gambling activity, amounts received from each player, the nature and value of prizes, and the fact of distributions of such prizes to the winners thereof;

(10) To regulate and establish maximum limitations on income derived from bingo. In establishing limitations pursuant to this subsection the commission shall take into account (i) the nature, character, and scope of the activities of the licensee; (ii) the source of all other income of the licensee; and (iii) the percentage or extent to which income derived from bingo is used for charitable, as distinguished from nonprofit, purposes. However, the commission's powers and duties granted by this subsection are discretionary and not mandatory;

(11) To regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter, including but not limited to, the extent of wager, money, or other thing of value which may be wagered or contributed or won by a player in any such activities;

(12) To regulate the collection of and the accounting for the fee which may be imposed by an organization,

corporation, or person licensed to conduct a social card game on a person desiring to become a player in a social card game in accordance with RCW 9.46.0282;

(13) To cooperate with and secure the cooperation of county, city, and other local or state agencies in investigating any matter within the scope of its duties and responsibilities;

(14) In accordance with RCW 9.46.080, to adopt such rules and regulations as are deemed necessary to carry out the purposes and provisions of this chapter. All rules and regulations shall be adopted pursuant to the administrative procedure act, chapter 34.05 RCW;

(15) To set forth for the perusal of counties, city-counties, cities and towns, model ordinances by which any legislative authority thereof may enter into the taxing of any gambling activity authorized by this chapter;

(16) To establish and regulate a maximum limit on salaries or wages which may be paid to persons employed in connection with activities conducted by bona fide charitable or nonprofit organizations and authorized by this chapter, where payment of such persons is allowed, and to regulate and establish maximum limits for other expenses in connection with such authorized activities, including but not limited to rent or lease payments. However, the commissioner's powers and duties granted by this subsection are discretionary and not mandatory.

In establishing these maximum limits the commission shall take into account the amount of income received, or expected to be received, from the

class of activities to which the limits will apply and the amount of money the games could generate for authorized charitable or nonprofit purposes absent such expenses. The commission may also take into account, in its discretion, other factors, including but not limited to, the local prevailing wage scale and whether charitable purposes are benefited by the activities;

(17) To authorize, require, and issue for a period not to exceed one year such licenses or permits, for which the commission may by rule provide, to any person to work for any operator of any gambling activity authorized by this chapter in connection with that activity, or any manufacturer, supplier, or distributor of devices for those activities in connection with such business. The commission shall not require that persons working solely as volunteers in an authorized activity conducted by a bona fide charitable or bona fide nonprofit organization, who receive no compensation of any kind for any purpose from that organization, and who have no managerial or supervisory responsibility in connection with that activity, be licensed to do such work. The commission may require that licensees employing such unlicensed volunteers submit to the commission periodically a list of the names, addresses, and dates of birth of the volunteers. If any volunteer is not approved by the commission, the commission may require that the licensee not allow that person to work in connection with the licensed activity;

(18) To publish and make available at the office of the commission or elsewhere to anyone requesting it a list of the commission licensees, including the name,

address, type of license, and license number of each licensee;

(19) To establish guidelines for determining what constitutes active membership in bona fide nonprofit or charitable organizations for the purposes of this chapter; and

(20) To perform all other matters and things necessary to carry out the purposes and provisions of this chapter.

[2002 c 119 § 1; 1999 c 143 § 6; 1993 c 344 § 1; 1987 c 4 § 38; 1981 c 139 § 3. Prior: 1977 ex.s. c 326 § 3; 1977 ex.s. c 76 § 2; 1975-'76 2nd ex.s. c 87 § 4; 1975 1st ex.s. c 259 § 4; 1974 ex.s. c 155 § 4; 1974 ex.s. c 135 § 4; 1973 2nd ex.s. c 41 § 4; 1973 1st ex.s. c 218 § 7.]

9.46.0325. Social card games, punch boards, pull-tabs authorized.

The legislature hereby authorizes any person, association or organization operating an established business primarily engaged in the selling of food or drink for consumption on the premises to conduct social card games and to utilize punch boards and pull-tabs as a commercial stimulant to such business when licensed and utilized or operated pursuant to the provisions of this chapter and rules and regulations adopted pursuant thereto.

[1987 c 4 § 29. Formerly RCW 9.46.030(4).]

9.46.295 Licenses, scope of authority — Exception.

Any license to engage in any of the gambling activities authorized by this chapter as now exists or as hereafter amended, and issued under the authority thereof shall be legal authority to engage in the gambling activities for which issued throughout the incorporated and unincorporated area of any county, except that a city located therein with respect to that city, or a county with respect to all areas within that county except for such cities, may absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.

[1974 ex.s. c 155 § 6; 1974 ex.s. c 135 § 6.]

APPENDIX C

Washington Administrative Code (WAC)

WAC 230-04-175 License does not grant vested right. The issuance of any license by the commission shall not be construed as granting a vested right in any of the privileges so conferred.

[Order 25, § 230-04-175, filed 10/23/74; Order 12, § 230-04-175, filed 2/14/74; Order 5, § 230-04-175, filed 12/19/73.]

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(3)

No. 08-1247

In The
Supreme Court of the United States

STAR NORTHWEST, INC., a Washington corporation d/b/a Kenmore Lanes and 11th Frame Restaurant & Lounge,
Petitioner,

v.

CITY OF KENMORE, a Washington municipal corporation, and KENMORE CITY COUNCIL, the legislative body of the City of Kenmore,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents' Brief in Opposition did not attempt to reconcile the decisions of the Washington Supreme Court in *Rhod-A-Zalea v. Snohomish County*, 136 Wash. 2d 1, 959 P.2d 1024 (1998), and *State v. Thomasson*, 61 Wash. 2d 425, 378 P.2d 441 (1963), (or similar decisions from other jurisdictions) and the Ninth Circuit panel's decision in this case. Respondents largely concede that the courts of Washington and other states have found a constitutional right to an amortization period on termination of a lawful nonconforming use. Instead, Respondents offered reasons why Kenmore Lanes[1] does not have the constitutional rights of other lawful businesses, including (1) Kenmore Lanes has no Fourteenth Amendment rights because the Washington State Gambling Act prohibits municipalities from granting an amortization period when banning card rooms; (2) a licensed card room has no Fourteenth Amendment rights because its business is vice-like. In this Reply, Kenmore Lanes will explain why these arguments did not persuade the Ninth Circuit and should not persuade this Court and respond on Respondents' newfound mootness claim.

REPLY TO RESPONDENTS' REASONS FOR DENYING PETITION

1. Respondents, for the first time, argue that Kenmore Lanes' claim is moot. Respondents reason

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[1] Petitioner, Star Northwest, Inc., does business as Kenmore Lanes and the 11th Frame Restaurant & Lounge, and is referred to herein as "Kenmore Lanes."

that some amortization periods are one year or less; therefore, the three years that Kenmore Lanes has operated during this litigation cured the deficiency in their Ordinance. Respondents, not for the first time, have failed to take account of the consequences of their action. Operating under a temporary restraining order, preliminary injunction and stay on appeal is much different than a delayed effective date in an ordinance. The publicity surrounding the City's ban and the uncertainty about when and whether it would be forced to close has substantially reduced Kenmore Lanes' patronage, resulting revenue and profitability. In short, temporary injunctive relief during litigation is not the same as a provision in an ordinance allowing operation for a specified period.

As well, Respondents have gotten ahead of the process because the necessary amortization period has not been determined.[2] Respondents' own cases indicate that calculation of an appropriate amortization period requires a balancing of factors. *See Northend Cinema v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1159-60 (1978), and *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1199 (9th Cir. 2004). The evidence Kenmore Lanes

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[2] Respondents suggest that Kenmore Lanes sought only a one-year amortization period. Brief in Opposition at 18. That is incorrect, as Kenmore Lanes' complaint attacked the validity of the Ordinance and did not request a specific amortization period. It has proffered evidence that a one-year amortization period was removed from the proposed ordinance in support of its challenge to the Ordinance. But, its criticism of the City Council's decision to remove a one-year amortization period from the proposed ordinance is not equivalent to agreeing to the term provided for in the proposed ordinance.

submitted in the district court showed that recovery of the value of its investment, $4,936,000, would take more than five years, much more than the period of operation during litigation.

Respondents suggest that regardless of its constitutional right to an amortization period, Kenmore Lanes' card room license would have expired more than two years ago. This is incorrect. Kenmore Lanes' license has been renewed annually, just as it has been renewed annually as long as Kenmore Lanes has owned it and since the card room commenced operation in 1974. More fundamentally, the property right in question is the right to operate a business, not merely the license. *See Lee & Eastes v. Pub. Serv. Comm'n,* 52 Wash. 2d 701, 328 P.2d 700, 702 (1958). That business has no expiration date, and the constitutional claim that derives from its termination is not moot. *Cf. Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 239 (1985) (business' challenge to the revocation of its liquor license became moot when the business closed because "no decision on the merits by this Court can now have an effect on" the disputed license).

The remainder of Respondents' Brief in Opposition defended the Ninth Circuit panel's analysis of federal law and urged state law reasons why Kenmore Lanes lacks a federal constitutional right. As neither of these approaches elucidates or eliminates the clash between the Washington Supreme Court's decisions and the Ninth Circuit panel's decision in this case, they do not aid the Court in judging this Petition. The remainder of the Reply offers brief rebuttal of Respondents' points.

2. Respondents claim that the Washington State Gambling Act of 1973, Revised Code of Washington (RCW) chapter 9.46, bars municipalities from granting a card room an amortization period overriding the constitutional amortization right described in *Rhod-A-Zalea v. Snohomish County*. Neither of the City's cases, *Edmonds Shopping Center v. City of Edmonds*, 117 Wash. App. 344, 71 P.3d 233 (2003), and *Paradise, Inc. v. Pierce County*, 124 Wash. App. 759, 102 P.3d 173 (2004), even analyzed the constitutional right to an amortization period. Indeed, in *Edmonds*, the Court of Appeals recognized what Respondents now dispute—that *Rhod-A-Zalea* requires that constitutional limits apply to city police power actions even when police power actions target card rooms. *Edmonds*, 71 P. 3d at 240 n.33. Thus, they give Respondents no help on the application of *Rhod-A-Zalea* and *Thomasson*.[3] These cases were not mentioned in the Ninth Circuit's analysis of the Kenmore Lanes' substantive due process claim, and they offer no guidance to this Court either.

Respondents also suggest that this case concerns solely interpretation of a provision of the Washington State Gambling Act. Respondents do not explain how such a statute could overcome a federal constitutional right. *See* U.S. Constitution Article VI, Clause 2 (Supremacy Clause); *New York v. United States*, 505

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[3] In *Edmonds*, the plaintiff made no claim that it had a constitutional right to an amortization period, choosing to challenge only the ban itself. 71 P.3d at 242. In *Paradise*, the ordinance provided for a three year amortization period and the plaintiff did not challenge the sufficiency of that period, so the constitutional right to an amortization period was not in question. 102 P.3d at 176.

U.S. 144, 159 (1992). Nor do Respondents cite any case suggesting that the Washington State Gambling Act curtails a business owner's constitutional right to an amortization period on termination of a legal nonconforming use. Any such argument would be unavailing because the Act does not purport to prescribe the conditions under which card rooms may be banned.[4] Indeed, in *Paradise*, proffered by Respondents, the subject ban on card rooms deferred the effective date *for existing card rooms* for three years, effectively providing an amortization period. 102 P.3d at 176. The City Attorney for Respondents' suggested a similar delayed effective date when the Kenmore ordinance was presented for vote, but the City of Kenmore ignored his advice.

3. *Rhod-A-Zalea* states constitutional limits for termination of nonconforming uses, but Respondents suggest that the Washington Supreme Court's analysis of constitutional requirements is "dicta" because it was not necessary to the decision in that case. This unfairly minimizes the Washington Supreme Court's explication of the law. Presented with Rhod-A-Zalea's argument that a legal nonconforming use was not subject to subsequent police power regulations, the Washington Supreme Court surveyed the jurisprudence of this Court and many cases from other states and described the constitutional

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[4] The Act sets up a system of licensing and regulation under the authority of the State Gambling Commission. RCW 9.46.295, the provision relied on by Respondents, is entitled "Licenses, Scope of Authority—Exception." It provides that a state-issued license is authority to engage in gambling activities, but allows cities and counties to prohibit "any or all of the gambling activities for which the license was issued."

limitations on termination of a legal nonconforming use. 959 P.2d at 1027-29. That analysis of constitutional limits on regulation of legal nonconforming uses was necessary to its holding in the case and is not dicta. *See Grundy v. Thurston County*, 155 Wash. 2d 1, 117 P.3d 1089, 1093 (2005) (rejecting as dicta statements about seawater in a decision addressing river overflows because "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed") (citation omitted).[5] *See also City of West Richland v. Dep't of Ecology*, 124 Wash. App. 683, 103 P.3d 818, 822 (2004) (an analysis distinguishing distinct but related concepts was not dicta). Notably, Respondents did not label as dicta the Washington Supreme Court's similar statements in *Thomasson,* 378 P.2d at 443-44 (invalidating the conviction of a wrecking yard operator on the ground that termination of an existing nonconforming use is unconstitutional insofar as "it deprives individuals of vested rights without due process of law"). *See also State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 242 P.2d 505 (1952).

4. In briefing before the Ninth Circuit, Respondents argued that Kenmore Lanes lacked a Fourteenth Amendment right because its business is "vice-like." The Ninth Circuit panel was not persuaded, and its

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[5] The Ninth Circuit similarly takes a narrower view of what constitutes dicta than urged by Respondents. *See, e.g., United States v. Ingham*, 486 F.3d 1068, 1079 n.8 (9th Cir. 2007) (a "careful three-page treatment" of a subject was not dicta because it was not "made casually and without analysis, . . . uttered in passing without due consideration of the alternatives . . . ") (citation omitted) (alteration in original).

original Memorandum decision explicitly assumed that Kenmore Lanes had the requisite constitutional right supporting a substantive due process claim. This is because labels like "vice-like" do not impair Kenmore Lanes' constitutional right to an amortization period. The City anchored its argument here in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), a First Amendment case that applied a constitutional test for restrictions on commercial speech and confirmed that restrictions on gambling-related speech met *Central Hudson*'s[6] constitutional requirements.[7] The case did not take up the constitutional rights of legal businesses engaged in a nonconforming use and does not apply here. While gambling – like many things – can be banned, once established, the gambling business becomes a use, and the owner gains the right to an amortization period when the use is terminated. *Thomasson*, 378 P.2d at 443-44.[8] When the *Edge*

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[6] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[7] The Court has since modified its view of the social acceptance of gambling. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), the Court noted that Congress has taken action to promote gambling and whatever the policy in earlier years, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." 527 U.S. at 187.

[8] Even highly-regulated uses, such as gambling and liquor sales, cannot be summarily terminated without a factual inquiry into the use's impacts. *See, e.g., AVR, Inc. v. City of St. Louis Park*, 585 N.W.2d 411 (Minn. App. 1998) (City did not violate equal protection rights when it amortized a nonconforming ready-mix concrete plant but allowed a nonconforming liquor bar to operate indefinitely because, after a factual inquiry, the concrete plant created significant negative impacts, and the liquor bar did not).

Broadcasting Court declared that gambling had no constitutional protection, it referred to the government's right to prospectively ban it, and did not address a municipality's obligation to provide an amortization period when banning an established gambling business.[9]

The Court's treatment of gambling-related advertising in *Edge Broadcasting* has since been clarified in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996). In that case, a four-member plurality of the Supreme Court rejected the analysis in *Posadas*, relied upon by *Edge Broadcasting*, and explicitly stated that there is no vice exception that justifies violation of constitutional rights, especially when the activity is authorized by statute. *Liquormart*, 517 U.S. at 513-14 ("Almost any project that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market"). *See also Ruben v. Coors Brewing Co.*, 514 U.S. 476, 478, 482 n.2 (1995).

Furthermore, the City's reliance on First Amendment case law does not answer the Washington cases identifying business owners' property rights which are weighed against the City's exercise of its police power. Whether the facility in question is a bar, a cement plant, a wrecking yard, or a card room, if it

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[9] *See Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

is an existing legal use, the owner has a property right that must be balanced against the City's exercise of its police power. Labels like "vice-like" or "nuisance-like" are not found in the case law on termination of nonconforming uses — in Washington or elsewhere. Instead, the City may find exception to the amortization requirement only if it proves a nuisance. That, it has not attempted.

5. Respondents' defense of the Ninth Circuit's substantive due process analysis did not take up the conflict between it and the decisions of the Washington Supreme Court. Respondents begin this analysis by looking back to the district court's conclusion that the Fifth Amendment subsumes a substantive due process claim, citing *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996). But, as Kenmore Lanes explained in its Petition, post-*Lingle v Chevron USA, Inc.,* 544 U.S. 528 (2005), the Ninth Circuit has rejected this rule. *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 855-57 (9th Cir. 2007), and the Ninth Circuit did not apply it in this case. Persisting with this theme, Respondents suggest that Kenmore Lanes' claim really sounds in takings because "no amount of compensation can authorize" a substantive due process violation. Brief in Opposition at 21 (citing *Lingle,* 544 U.S. at 534-44). This argument misunderstands the purpose and effect of an amortization period. Profits from one, two, three, or even five years of operation would not compensate Kenmore Lanes for the loss of a business valued at almost five million dollars. Amortization periods enabling transition and mitigation of injury rationalize municipal action to terminate a legal nonconforming use that is otherwise arbitrary.

Respondents also revisit and invoke Washington Administrative Code (WAC) 230-04-175, the repealed Gambling Commission regulation on "vesting." The Ninth Circuit panel relied on this provision in its initial Memorandum decision, but, on Kenmore Lanes' petition for rehearing, deleted that part of its Memorandum in favor of the substantive due process analysis that is the subject of this Petition. Respondents maintain that the panel's substituted substantive due process analysis comports with *Lingle* and Ninth Circuit precedent, but this endorsement of the panel's analysis does not answer the point of Kenmore Lanes' Petition—that the Ninth Circuit panel's decision directly conflicts with the Washington Supreme Court's decisions requiring an amortization period on termination of a lawful nonconforming use. Resolution of that split awaits this Court's review.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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